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Church-State Separation, Healthcare Policy, and Religious Liberty

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ABSTRACT

This paper sketches a framework for the separation of church and state and, with the framework in view, indicates why a government's maintaining such separation poses challenges for balancing two major democratic ideals: preserving equality before the law and protecting liberty, including religious liberty. The challenge is particularly complex where healthcare is either provided or regulated by government. The contemporary problem in question here is the contraception coverage requirement in the Obama Administration's healthcare mandate. Many institutions have mounted legal challenges to the mandate on grounds of religious freedom. The paper proposes a number of interconnected principles toward a resolution of the problem: for the institutional realm, specific principles for church-state separation and a principle concerning the protection of citizens'sense of identity; and for the ethics of citizenship in the conduct individuals, principles that provide an adequate place for natural (thus secular) reason in lawmaking and political decisions.

In the political philosophy of the present age, there is nearly universal agreement that democratic government should separate church and state—specifically, governmental and religious institutions. This paper sketches a framework for that separation widely acceptable by international standards. The paper will not argue for it beyond pointing to grounds of a kind that are commonly respected by writers in political philosophy. With the framework in view, the paper indicates why maintaining church-state separation tends to create difficulty in balancing two major democratic

ideals: preserving equality before the law and protecting liberty, including religious liberty. The challenge is particularly complex where healthcare is either provided or regulated by government. There are at least two problems in balancing the imperatives of equal treatment and protection of liberty: one problem is raised by government's requiring, for the well-being of the populace, healthcare of a kind that some religions prohibit; another is defining what constitutes healthcare in the first place.

With healthcare legislation by the Obama Administration as a case study, I will consider the issue of contraceptive coverage as a requirement on private employers who provide employee health insurance. I refer to the "preventive services" mandate of the Affordable Healthcare Act passed under the first Obama Administration. [1] The mandate has been challenged in the courts by (among others) Liberty University and the University of Notre Dame and is being widely debated in the U. S. My overall conclusions will bear on both that specific issue and the general question of how to balance considerations of democratic equality and freedom of religion.

THE SEPARATION OF CHURCH AND STATE: THREE CENTRAL ELEMENTS

On my view, democratic societies should be structured in keeping with three church-state principles as major standards for sound government. These largely rest on the premise that liberty and basic political equality, including one-person, one-vote and equality before the law, are default standards in democracies. Departures from them stand in need of justification, as where religious grounds are the only legal basis for exemptions from military conscription (Audi 2000; Audi 2011a). They no longer are in (for instance) the United States; and in many countries where religion has had a special legal status, that status has gradually diminished (see, e.g., the Supreme Court decision in *United States v. Seeger*, 380 U.S. 163,1965).

The Liberty Principle

The first standard is *the liberty principle*: Government should defend "maximal" freedom, including religious freedom (I assume that there is a moral right to such

1. This mandate requires employers to cover contraceptive services under their insurance plans, including sterilization and drugs that, taken shortly after intercourse, prevent pregnancy—"morning after pills" (though the period of effectiveness is considerably longer than this suggests and likely varies with different people).

freedom). Determining such maximality is difficult. Here I suggest that we keep in mind something close to Mill's famous harm principle: "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection . . . to prevent harm to others."[2] Arguably, allowing a person to die by preventing or even withholding a transfusion or some other readily available medical treatment is doing a harm; but even if it is not (and is instead, e.g., *allowing* a harm), other principles proposed in this paper will justify government's outlawing, as the U. S. Supreme Court has, Jehovah's Witnesses' refusing life-saving transfusions for their minor children. Consider, by contrast, sending messages announcing religious services by billboard postings on church property. The harm principle could not in any normal circumstances justify restricting these.

An intermediate case would be the use of loud speakers for public calls to prayer. Do loud announcements like this harm those whose concentration they break? And might it matter whether the call is only weekly or much more frequent? There is no simple answer, but the question does bring out that behavior that is not intrinsically harmful, such as low-volume monthly announcements with content of wide interest in a community, can rise to a harm if magnified or greatly increased in frequency.

The Equality Principle

The second standard is *the equality principle:* Government should treat different religions equally. If one thinks of churches as institutional citizens, this can be seen as a special case of the democratic commitment to equal treatment of citizens. The establishment clause in the U. S. Constitution, which prohibits government from establishing a church, accords with this principle. Similarly, the principle requires that church bells and religiously employed loud speakers be treated equally, so that, for instance, a level of annoyance created by church bells for citizens who dislike those is regulated comparably with loud speaker calls to Muslim prayer.

Granted, if churches outnumber mosques in a community, there might be more bell ringing than loud speaker calls to prayer. This disparity could nonetheless be

2. (Mill 1869/1978), pp. 9—10. Mill opposed parentalism, hence (for competent adults) excluded harm to oneself as justifying interference. The notion of harm is seriously vague. Both environmental concerns and questions concerning freedom of economic behavior raise issues about just how free we ought to be under the harm principle. For instructive recent studies bearing on this issue and, especially, on the strength of the obligation not to harm in comparison with that of the obligation to render aid, see Cullity (2004) and Lichtenberg (2010).

an instance of proportionate equality. Unequal treatment is not entailed by unequal representation of a regulated behavior by different constituencies. Equality does not entail uniformity.

The Neutrality Principle

The third church-state standard I propose is *the neutrality principle:* Government should be neutral with respect to religion. This is not a consequence of the second principle, since equal treatment of different religions is compatible with preference for religious over non-religious institutions or citizens. There are other respects in which governments should be neutral. They should not, for instance, prefer the interests of athletes over those artists. The question at issue is *structural preference,* the kind built into a constitution, as opposed to legislation, passed by a democratic majority, which differentially benefits a given group. If, to respect majority preference, a city council votes to use limited funds to build a stadium rather than a concert hall—this does not violate the neutrality principle, whereas a *constitutional preference* of the same kind would.

Similarly, if majority preference leads to prohibiting new construction of tall structures in a certain region, this might interfere with plans to build minarets yet not affect church construction projects (since none need involve building new steeples), whereas a prohibition of the former *as such* but not the latter as such would be unequal treatment of religious institutions. These cases illustrate differences in treatment of religion that are intrinsic to governmental policy from differences in effect on religious institutions that are contingent on circumstances.[3] This difference remains even if, because of such factors as governmental commitment to civil liberties, the de facto level of freedom for citizens, and indeed the level of support for religious institutions in general, are higher than they might be without an established church. In England, for instance, efforts in these directions could be partly motivated by a realization that, in terms of ideals for democracy as opposed to historical continuity, an established church is (other things equal) undesirable.

Protection of the Sense of Identity as a Normative Standard in Democracies

3. As it happens, in Switzerland limitations have been imposed on building minarets without a parallel religiously neutral limitation on building church steeples.

Why should religion be singled out in political philosophy in a way other voluntary commitments, such as artistic ones, are not? One answer concerns the history of certain democratic societies and the importance of religion therein. But there is another consideration, independent of contingencies of time and place. For the sake of the flourishing of citizens, democracies should observe a *protection of identity principle:* The deeper a set of commitments is in a person, and the closer it comes to determining that person's sense of identity, the stronger the case for protecting the expression of those commitments.[4] This principle is neutral with respect to how particular values and activities play this role for a given citizen. It is also normatively neutral regarding what those values and activities are: the democratic commitment is to the inherent value of protecting people's freedom to realize their deepest desires, which include their "self-defining" ones; and it does not discriminate among these desires except insofar as protections of liberty (or comparably strong democratic standards) require it.

Although the protection of identity principle is religiously neutral in content, it has special significance for church-state issues. For as a matter of historical fact and perhaps of human psychology as well, religious commitments tend to be important for people in both ways: in depth and in determining their sense of identity. Other kinds of commitments can be comparably deep (in a sense implying both rootedness and a tendency to control a significant segment of behavior); this principle does not discriminate against those—nor does it presuppose any controversial metaphysical view regarding what determines a person's actual identity. But few if any nonreligious kinds of commitments combine the depth and contribution to the sense of identity that go with many—though not all—religious commitments. Patriotism is a good example here; it can run very deep in a person, and the protection of identity principle applies to it. It is an interesting question whether the deepest and most behaviorally controlling forms of patriotism tend to have properties akin to those of religious commitment.

4. This is formulated and discussed in ch 2 of (2011a). I should add that the case for protecting expression of a person's sense of identity can be overridden by the need to protect the well-being of other people. If a sadist's sense of identity is expressed in malicious deeds, protection of others will likely override the case for protecting it.

HEALTHCARE POLICY AS AN ISSUE IN DEMOCRATIC SOCIETIES

This is not the place for a theory of the overall role of government in democracies. Here I simply assume something few political philosophers will contest: that a prosperous democracy should seek to guarantee (even if it does not itself provide) a suitable minimum standard of healthcare for citizens.[5] In some cases, religious objections to a medical policy or procedure clash with requirements that governments or majorities of citizens or both take to be within the suitable minimum. These are the kind holding special interest for this paper. Let us consider some general points and then proceed to the Obama Administration's contraceptive ruling.

Certain extremes may be clear, as noted above in relation to the liberty principle. Consider the Jehovah's Witnesses, whose religion prohibits blood transfusions. The protests against the Obama mandate do not go to the extreme of seeking to exclude coverage for transfusions where they would be refused on religious grounds and might be imposed by force, say to save the lives of children. Here the state might require them (and their reimbursement by healthcare plans) despite religiously based parental protests. But the imperative to protect liberty could be invoked from another perspective—that of employees or students who might feel their liberty is affected by financial hardship. Consider a married female custodian who has three children and very strongly wants no more. If her healthcare plan does not cover contraceptive services, she may have to choose between expenses she cannot afford and abstinence that—perhaps because of factors beyond her control—she cannot achieve. One might argue that democratic governments need not be concerned with such matters or, more plausibly, that imposing the costs in question does not imply a restriction of liberty that government should prevent: surely, someone might argue, the custodian may privately purchase contraceptive services simply by being more economical in buying food or clothing.

The issue here is representative of many in ethics: it is nothing less than what level of cost or suffering renders its imposition a restriction of liberty or, more specifically, a restriction sufficient to justify government's passing laws to prevent it. When do we lack freedom to do something, and when is doing it merely costly? Moreover,

5. If 'residents' is substituted for 'citizens', the degree of consensus drops; it also diminishes with increases in the minimal level of healthcare guaranteed. There are many issues here and I leave them aside since the results of this paper are largely neutral with respect to them.

there are degrees of freedom both *to act* and *in acting*; and democratic governments may properly seek to support the highest degree of at least the former. Regarding freedom *in* action, there is no simple uncontroversial way to distinguish free from unfree action or to determine degrees of freedom in action. But, concerning freedom *to* act (roughly, *of* action), a good case can be made for a democratic society's taking reproductive freedom—the freedom to reproduce or not[6] —as both important and, especially in the contemporary world, easily undermined. This point applies particularly to women, many of whom are either dependent on men for at least a large portion of their economic resources or largely subject to the will of men, or both.

If we add that some people may think they have a religious obligation of stewardship to limit the size of their families, then religious liberty itself may be argued to be curtailed by excluding contraceptive coverage. Perhaps this much may be concluded here: in a society in which government abides by the liberty principle, where reasonable disagreement may occur regarding what constitutes a restriction of liberty in a given realm (as with contraceptive use), then even if governmental protection of that liberty is not constitutionally required, it may be imposed, in an appropriate way, by majority rule. This is in any case one route to defending the Obama mandate, though we will soon see that there is an alternative policy likely to be favored by religious institutions.

INSTITUTIONAL RESISTANCE TO THE MANDATE ON CONTRACEPTIVE COVERAGE

Consider the Notre Dame protest, as stated in a letter from the University of Notre Dame's President, John Jenkins, to Kathleen Sebelius, Obama's Secretary for Health and Human Services.[7] A main point President Jenkins made is that the mandate treats institutions that by policy serve mainly co-religionists differently than those, such as Catholic universities, that do not, since both admissions and

6. This is not the place for a detailed discussion of reproductive freedom, but I am assuming that the freedom of women not to be forced to bear children is both (a) extremely important, in part because childbearing imposes risks and, normally, moral and other burdens on them, and (b) *more* important than the freedom to reproduce, in part because curtailment of that does not impose those risks and burdens *and* reproduction may impose risks and burdens on outside parties. Even the latter freedom, to be sure, is of sufficient importance to give democratic governments strong reason to protect it. The question whether democratic governments may impose penalties for reproduction under certain conditions, or seek to limit the number of children produced, is deep and difficult.

7. President Jenkins's letter is dated September 28, 2011 and was sent to the entire faculty of the University.

faculty appointments are not restricted to Catholics (even if, as a matter of statistical pattern, co-religionists are in the majority). This point is significant; but from the perspective of political philosophy, given the rationale for minimal healthcare standards, the point might be argued to favor extending the mandate to the former institutions rather than exempting the latter. The issue I want to concentrate on is not what exemptions there should be, if any, but how to approach the problem of balancing healthcare policy requirements against conflicting considerations raised by the right to free exercise of religion.

The Possible Bearing of a Principle of Double Effect

Here it may be instructive to consider the principle of double effect, which is, if not an element in much Roman Catholic moral teaching, at least respected by many ethicists writing in the Catholic tradition. I take this to be roughly the principle that if an action (such as adopting a healthcare plan) has two effects, one good and one bad, we may perform it in order to bring about the good effect, provided the bad effect is neither our (intended) means nor our (desired) end in doing the deed, and the good effect is sufficiently good to warrant permitting the bad one. The idea, as applied to the contraceptive mandate, would be that the *intention* of the Catholic institution is, e.g., to provide good, egalitarian healthcare without discrimination on the basis of religious conviction, and that covering of contraceptives is only a foreseen and regretted collateral consequence of adopting this healthcare plan.[8]

Even if the principle is both sound and applicable, it is not clear that it solves the problem for Catholic institutions. Granted, covering contraceptives is not a means to adopting the overall healthcare plan. Even granting, too, that covering contraceptives is an effect of, and not an element in, adopting the plan—which might be plausibly argued to be a conjunctive action with that as a component—the argument overlooks what seems presupposed by plausible appeals to double effect: that if there is an appropriate way to produce the good effect without the bad one, then producing the

8. I am not presupposing the soundness of any arguments intended to show that use of contraceptives is immoral. Moreover, this issue can be decoupled from the abortion question. Even if the Church's arguments on the two matters employ some of the same principles, the arguments are different; and as most informed Catholics realize, the population and family planning problems are, in many parts of the world, so serious that every effort should be made to reconsider traditional arguments that have precluded or made more difficult governments or individuals dealing with these problems through a proper use of contraceptive technology. I should also note that this application of a principle of double effect was pointed out to President Jenkins in a (2012) petition of 20 August, 2012, drafted by Kathryn Pogin and Benjamin Cohen Rossi, Notre Dame graduate students in philosophy, and signed by many Notre Dame faculty and students.

former does not warrant permitting the latter. Consider collateral damage in just war theory: if the only way to defeat the enemy requires bombing that will kill 100 civilians and defeating the enemy is morally important enough to justify the bombing, that is one thing; but suppose one could defeat the enemy by means equally deadly to combatants yet with far less collateral killing. Then the fact that bombing will do it does not warrant the collateral damage.[9] In the contraceptive case, government can apparently provide an alternative: direct funding of contraceptive services by, for instance, vouchers. Thus, an institution opposing the mandate could conceive its alternative to including contraceptive coverage in its policy as (by legal action) causing government to realize such an alternative. Minimally, if the principle of double effect is to justify an action with a bad effect, it must be formulated so as to entail that the good the action does cannot be realized with lesser undesirable consequences than bringing about the relevant bad effect.

The matter now becomes more complicated. How is the good effect of adopting and maintaining a healthcare provision to be determined? If, as in the case of the mandate, contraceptive coverage includes more than birth-control devices and drugs that prevent conception, one might have to consider the badness of terminating what many Catholics consider pregnancies as opposed to preventing pregnancies by contraceptives. If the coverage is more limited, this factor may be eliminable. Above I referred to the good of providing "good, egalitarian healthcare without discrimination on the basis of religious conviction" but did not assign any particular value to, e.g., being egalitarian in this way. This value is arguably great, but it cannot be quantified. Nor can we quantify the badness of unwanted pregnancies reasonably taken to be prevented by contraceptive coverage. These are only a sample of points suggesting that the comparative weighting required by the double effect principle will be difficult and may be inconclusive. That is not to suggest one should not attempt the weighting; it is relevant to any plausible moral appraisal of the issue, and even inconclusive weightings reflecting the many values raised by an issue can facilitate understanding of it and increase the probability of a negotiated settlement.

Governmental Funding of Healthcare

9. I omit mention of probabilities; it might be, e.g., that the relevant good effect could, but is extremely unlikely to be, realized without the bad effect, in which case the overall decision might reasonably allow producing the bad effect. Another complication is that actions have indefinitely many effects.

The difficulty of arriving at a solution that, even using the double effect principle, is satisfactory to all Roman Catholic institutions should lead us to consider more carefully the alternative of direct governmental funding of contraception. One alternative is a voucher system; another is simply reimbursing healthcare providers such as physicians and pharmacies. There are at least two important points here. Both illustrate that what a principle calls for differs in different circumstances. The first point is that the principle applies differently if government will fund contraception given their arguing for it than if it will not. If it will, then, for Catholic institutions, the good effects of adding contraceptive coverage would apparently not be supported by the principle as supplemented in the way proposed here, where the institutions can cause a policy change that will achieve the good result without the bad. If it will not, then (as where a suitable healthcare plan cannot be provided through government funds), the principle might support incorporating the Obama plan.

The second point here concerns an issue that is too easily ignored: the justification of taxation. Governmental funding of contraception entails that taxpayers cover an expense that—in an employer-centered system—arguably employers should shoulder. Even citizens who agree on the appropriateness of the Obama mandate in the first place might complain of being taxed for such a purpose. Still, protecting religious liberty is something all can agree is important; and here, as elsewhere when citizens are taxed to support things they disapprove of, the complaint is understandable but not decisive. If it were decisive, the freedom protected by democratic governments would include the option to pay either no taxes or pay them selectively. To be sure, a well-functioning democracy is designed to allow public protest before major policies are instituted and to use the ballot box to change governmental priorities.

An alternative to vouchers is for government to exempt religious employers from mandatory inclusion of contraceptive coverage and provide for all women wishing it to obtain it, if not from their own healthcare plan, then through government's requiring insurance companies to pay the costs.[10] This, however, seems objectionable on at least three counts. First, it violates the equality principle in favoring church-affiliated ("religious") institutions over private employers who may have the same religious objections to paying for contraceptives, thus privileging one kind of religious citizen or group of citizens over another religious kind of citizen or group. Second, it violates

10. According to National Public Radio in the U. S. and other media reporting on February 1, 2013, this is the initial shape of a compromise the Obama administration offered to religious institutions, with details to be determined.

the neutrality principle in requiring coverage to be paid for even if it is as deeply disapproved of for secular reasons as it may be for religious ones. There is, e.g., no conscientious objector status for insurance companies that (however unlikely) have deep moral objections. Third, as so far described, it does not cover contraceptive services for men.

As things now stand in the U. S., it is not clear that taxpayers—or at least the administration currently representing them—will approve a voucher system of a kind that would satisfy the demands of many employees in both religious institutions and certain private organizations. I will assume, then, that the question whether the mandate should be imposed on those institutions must (at present) be approached on the assumption that government will not fulfill those demands by vouchers or other "direct" means.

LEVELS OF COERCION AND THEIR NORMATIVE SIGNIFICANCE

These problems must be acknowledged to be serious, but here the main point that emerges from considering the ethics of taxation concerns several different kinds of coercion of citizens. Governmental coercion is our chief concern, but coercion may of course be perpetrated by non-governmental agents.

First-Order Versus Higher-Order Coercion

Consider the difference between requiring citizens to pay taxes to support, say, conducting the Vietnam War—which many Americans opposed—and subjecting them to conscription to fight it, with no exceptions for conscientious objection. Requiring people to fight a war against their conscience might be called *first-order coercion*: it is a case of forcing them to do the basic deeds,[11] such as killing people, that they consider wrong. Requiring them to support someone else's forcing others to do the deeds in question, as where a government taxes citizens partly to pay for military conscription, is, by-contrast, plausibly considered either complicity in the doing of those deeds or even *higher-order coercion*. It would not be *second*-order coercion, since citizens are not themselves coercers of the conscripts forced to kill; but it is, by forced

11. The deeds are basic in the order of normative assessment; they need not be basic actions, i.e., roughly those not performed *by* doing something else.

taxation, at least complicity in government's exercising first-order coercion, and it could be conceived as higher-order coercion of the deeds insofar as it is like empowering officials already intending (and able) to cause those deeds actually to cause them.

As this case shows, both the notions of complicity and of higher-order coercion need analysis and may in some cases both apply to an action. Moreover the order of coercion, as conceived here, is determined by how many levels of coerced or potentially coerced decision (as distinct from the number of individual decisions) are required above the level of the act-type (such as killing civilians) that is the basic object of disapproval or resistance on the part of the coerced. The matter is not as simple as coercing someone, at gunpoint, to coerce a third party to relinquish funds (a case of second-order coercion). Paying taxes that, for instance, support a war does not yield (militarily) killing people except as decided by those who order it or do it, or both; and there might be still other levels of decision. At each level, abstention from the deeds in question is at least commonly a possibility and, if so, the support of the actions the taxpayer disapproves of goes through the agency of someone else. This is morally significant, though by no means the only morally significant element in higher-order cases.[12]

The Moral Significance of the Order of Coercion

Democracies seem generally—and properly—to presuppose that the case for first-order coercion on the part of government must be stronger than the case for governmental higher-order coercion (though beyond the second-order case there may be no automatic diminution in the governmental responsibility to justify coercion). This presupposition is supported by a number of considerations, including the points that (a) one's moral responsibility for what one is coerced to support is at least less great than for voluntarily doing the thing(s) in question, and (b) at least commonly, the secondary agent(s)—those supported by the higher-order coercion,

12. Note, e.g., that, as might be significant for the contraceptives issue, the qualified principle of double effect suggested above seems applicable: the good of paying taxes to a democratically legitimate government outweighs the bad effect of the use of some of the funds to support contraception by way of, say vouchers; and though liberty allows attempts to alter governmental policy so as to make contraceptive funding a wholly private matter, there may be no appropriate alternative to paying the taxes. Some citizens might selectively withhold them, but this could have legal and political consequences that make it both unreasonable and unacceptable to them.

may themselves ultimately refuse to do the relevant deed(s).[13] A manifestation of the operation of this presupposition in some democracies may be a policy of allowing conscientious objector status for military conscription, which is first-order coercion, but not for the portion of taxation that supports the practice of conscription and military use of conscripts. To be sure, taxation need not be coercive for those who approve of it and of the use of the funds in question.[14] But it may be coercion at some higher level, depending on whether government does things to which the taxpayers in question are forced to acquiesce. The kind of difference indicated here between first- and higher-order conscription seems to provide some support for democratic presupposition that—other things equal—the need for governmental justification of coercion diminishes with increases in its order.

The distinction between first- and higher-order coercion for the healthcare issue has an important implication: it can explain why government may require actions at some higher level that it may not require at the basic level. Thus, supposing it cannot properly require contraceptive *use* by those who disapprove of it, it might still require contraceptive coverage to be funded by disapproving employers or, at a still higher level, by vouchers. Consider an institution that, like some Catholic universities, is self-insured. Requiring it to pay for contraceptive services could be, in certain special cases, roughly higher-order coercion. It would be forced to order lower-order behavior of a kind it disapproves of, such as imposing reimbursement obligations on those who actually pay out the funds. Here the insuring institution may consider itself complicit, even if involuntarily, in wrongdoing. Given the coercion, we might call this *complicitious coercion*; for institutions that do not disapprove, we would have *cooperative coercion*. The same distinction would apply to an institution's being forced to pay taxes to support vouchers that fund the relevant services, but the coerced support would be at least one level higher in the coercive framework: paying government to pay providers such as physicians or pharmacists, versus paying providers directly through funding one's healthcare plan that compensates them.

Moreover, where, as in the U. S., universities are tax-exempt, it is individuals

13. One may wonder why there should be any responsibility at all here; one answer is that there are deeds so heinous and degrees of coercion sufficiently far from what might be considered "maximal" that some responsibility would remain given those elements. This problem deserves more analysis than it has apparently received. I have discussed it in some detail in (Audi 1974).

14. Arguably, when taxation is imposed under strong legal penalties, it is first-level coercion relative to payment even for those who willingly pay, though in that case the coercion is not as serious a restriction of liberty as military conscription. That comparative point is another factor in explaining why conscientious objector status regarding taxation is (in at least some ways) more difficult to justify than in the military case.

who would be forced to support the services under a government voucher plan. These taxpayers, even if Catholic, may or may not disapprove of contraceptive use, and all are free to protest its use or to press for its restriction by law. Tax exemption does not apply to businesses, but they are also not religious institutions and so not my main focus here. Their proprietors as individuals, of course, should have the religious liberties justified by the church-state separation principles proposed above.[15]

The significance of levels of coercion also bears on the prospect—which may be realized in the future—of religious institutions refusing to cover medical services of *any* kind by physicians or others who provide contraceptive services or certain others, even where those using contraceptives pay the costs. Government's requiring coverage of this comprehensive kind would be at worst coercion two levels above the one at which the basically objectionable action occurs: coercion to support programs that are required to support providers who support users. Universities, for instance, would be required to support, although though intermediaries, medical activities of physicians who might prescribe contraceptives, thereby exercising presumably free agency, to someone who might use them, thereby exercising free agency at the "basic" level. If some of these physicians also provide legal abortions, the matter is more serious. The difference between levels of coercion, however, is still relevant. Thus, to the points that have emerged so far, we should add that, other things equal, governmental coercion to support voluntary doing of deeds against one's conscience requires less justification than governmental higher-order coercion whose object is mandating those same deeds. This need not be weak justification; the principle does not concern absolute levels of justification. With all this in mind, let us consider abortion as a foil for the case concerning contraception.

THE SPECIAL PROBLEM OF ABORTION

The Obama Administration's mandate does not require private employers to pay for legal "elective" abortions, and these are the main cases of abortion we must consider in relation to the issue of healthcare policy. Here I have two points. First, this exemption reflects governmental appreciation of the point that the moral case

15. Even incorporated businesses may, however, claim the religious liberty rights of individuals or, on neutrality grounds, those of religious institutions. *The Wall Street Journal* reported that two Chicago businesses protested the Obama contraception ruling on religious liberty grounds. The article noted a government lawyer's response that corporations are distinct from their shareholders and "not necessarily entitled to the same protection that individuals receive" (23 May 2013, p. A6). Other protests are reported by Bronner (2013).

against elective abortions is—or is at least is plausibly judged to be—stronger than the moral case against contraceptive use. On most views of the matter, this applies both to the force of available arguments against contraceptive use as opposed to abortion and to the moral gravity of the act in question relative to that of contraceptive use.

One plausible general principle applicable here is this. Other things equal, where killing a kind of being would be wrong, preventing the creation of one of the same kind, if wrong, would be less objectionably so. A second point is that the scope of the term 'abortion' is disputed. Some consider the morning after pill potentially abortifacient; others reject this view. For some people, the issue turns on when, in the period between fertilization of an ovum and its implantation in the uterus, the pill preventively acts and when, during that process or later in normal prenatal development, personhood may be properly ascribed to what might be generically called the union of sperm and egg. This point raises the question whether, in a democratic society, the scope of healthcare and indeed of personhood should be legally defined in a way that is religiously neutral.

Under the neutrality principle proposed here, the answer is affirmative. It should be added that if, as seems plausible, no actual government could allow religious considerations to figure in defining personhood without favoring some religions over others, then the equality principle would also be violated. The plausibility of that conclusion is enhanced by the point that, between and even within different religious groups even in the U. S. alone, there are disagreements regarding abortion itself, and consequentially regarding what counts as desirable healthcare.[16] It would seem, in any case, that the liberty principle yields a similar conclusion. Recall that some people may have religious reasons for wanting to limit the size of their families—or, perhaps, to avoid having to tolerate bearing a child as a result of rape. The religious liberty of the latter, like that of women subject to other kinds of coercion by husbands or others, would be abridged by prohibiting use of the morning after pill.

It should be clear, then, that if some religions endorse—on religious grounds such as divine ensoulment of human eggs immediately upon fertilization—the early personhood of those entities, and other religions reject this timing of initial personhood, whether on religious grounds or not, then governmental prohibitions or re-

16. I leave aside the difficulty of defining 'religion'. This seems permissible here because the issues in question can be discussed quite informatively and, for most purposes, adequately, in relation to uncontroversial cases of religion.

strictions of the use of the morning after pill would be de facto unequal treatment of different religions. It does not follow, though it is certainly arguable, that such rulings would be a manifestation, perhaps unconscious, of preference for one or more religions I say 'certainly arguable' because, regarding the time or temporal period during which personhood is first present, and particularly regarding the view that it coincides with conception, it is at best difficult to find arguments of a completely religiously neutral kind that carry the conviction of even a near majority of the leading thinkers who have studied the problem without relying on religious considerations or presuppositions.

Are there religiously neutral arguments that might justify law-making that restricts either the morning after pill or at least uncontroversial cases of abortion? It is noteworthy that many in the Catholic tradition who oppose abortion (among others who oppose it) appeal to natural law arguments or other arguments presented in secular terms. But, to a good majority of secular moral and political philosophers, as well as to a large proportion of reflective people in many religious traditions, those arguments do not seem cogent. This suggests that the secular arguments do not justify governmental prohibitions of all elective abortions; and although it certainly does not follow that the arguments dependent on religious considerations are not sound, they are, at least on the church-state separation principles presented here, the wrong *kind* to serve as a basis for definitions of personhood, or the associated restrictions of liberty, in a democratic society.[17]

WHAT COUNTS AS HEALTHCARE?

The religious realm is not the only area in which what counts as healthcare is controversial. Where the malady is "emotional," as with anxiety, there are differences over what is normal, what counts as health, and what should be covered by insurance. With contraception, both emotional and other psychological variables are relevant to coverage, as well as biological factors. People who think that contraception is morally wrong will tend to believe that even for those who disagree on this, it is not a healthcare need. People who believe this might divide over whether, at least for women, contraception counts as a preventive healthcare need in living conditions in which rape or other kinds of sexual coercion are difficult to prevent, as in parts of India and Africa (HIV infection remains a problem in this connection, particularly

17. These conclusions are clarified and supported in Ch 6 of (Audi 2000).

in certain regions of Africa). In any case, by uncontroversial standards for preventing physically dangerous and psychologically trying or even traumatizing conditions, the grounds for regarding contraceptives as preventive healthcare in those situations—which exist in many parts of the world—are considerably stronger than in countries where women can freely control their potentially reproductive behavior. Here I will assume that these grounds are morally sufficient to make contraceptive coverage a high priority for certain governments, even non-democratic ones.

In relation to the contraceptive coverage issue as understood by private employers facing the Obama Administration mandate, however, even in the case (as with many marriages) in which women can successfully refuse to reproduce—at least after bearing a number of children acceptable to them—some people may doubt whether contraceptives as such are a healthcare need.[18] Appraising this doubt is impossible here, but it may be instructive to compare circumcision, which is covered by some healthcare plans. There is disagreement in the medical community over whether this is desirable from a healthcare point of view, but even apart from how that issue may be resolved, two points are pertinent. First, non-circumcision normally does not affect the life and well-being of the males in question to anywhere near the extent to which the unavailability of contraception usually affects the life and well-being of sexually active women. Second, given this, and given how much of the strong sentiment favoring circumcision is religiously grounded, full or partial coverage for it but not for contraception creates a presumption—not irrefutable but difficult to defeat—that the differential treatment of the two by government would violate the neutrality principle.[19] Some would likely hold that it also shows a preference for the interests of males over those of females.

The main issue before us, however, is not what actually constitutes healthcare but whether government may require what it considers necessary for adequate healthcare against the religious principles or convictions of those who must provide it, at least in paying for it. If, as I have argued, religious considerations may not, for public policy purposes, be used to define healthcare, then the central question is whether a democratically proper, religiously neutral definition of it may be imposed on private employers whose religious liberty is thereby reduced. The next section will suggest a

18. *As such* because contraceptives may be needed for clearly medical uses. Here the suggested principle of double effect might be invoked by some who disapprove of contraceptives: prevention of pregnancy is only a collateral effect of their intended use: to cure the malady.

19. A recent court case in Germany forbidding circumcision as a requirement on infant males is apparently based on this or a similar principle.

positive answer for cases in which the burden on religious liberty is not sufficiently great relative to the healthcare benefits to outweigh the government's case.

THE COMPARISON OF BURDENS ON THE FREE EXERCISE OF RELIGION

If, in democracies, what constitutes healthcare cannot be properly defined by religious criteria (or by taking their satisfaction as a necessary condition), then there is no question that democratic governments may count terminating a pregnancy that will kill the pregnant woman as healthcare toward her. But suppose the pregnancy is due to rape and the woman strongly desires to terminate it. This case is more complicated. Even some who believe that termination would in at least some such cases be healthcare would hold that the rights of the conceptus or fetus still preclude the moral permissibility of termination and (some of these people might also argue) *should* preclude legalizing termination or certainly should prevent requiring private employers to cover it in their plans. Here I would reiterate that government should not be required to define healthcare by religious criteria; but we must grant that forcing certain private employers, at least those who hold traditional Roman Catholic views, to include in their healthcare plans even the kinds of abortions described would be a more serious abridgment of their religious freedom than simply requiring contraceptive coverage. How is the comparison between governmental responsibility and religious liberty to be understood here?

An Incommensurability Problem

There is surely no one value, such as the badness of pain, in terms of which alone we can make the comparison. To be sure, some ethical thinkers might advocate a utilitarian approach. But even if democratic governments could make a commitment to some one kind of ethical theory, there are at least two normative problems that go beyond the difficulty of determining the relevant probabilities for positive and negative outcomes. The first is that on any serious utilitarian view there are at least two kinds of value, roughly the positively and the negatively hedonic, say pleasure and happiness and, on the other side, pain and suffering. The second is that there seem to be qualitative differences in the worth of these. How can we weight, say, the intrinsic value of aesthetic versus culinary pleasures or the intrinsic disvalue of physical pains

versus such psychological suffering as acute anxiety and severe depression? Mill and other utilitarians have sketched ways to represent differences of quality as differences in quantity for purposes of moral decision (Mill 1869/1978, ch2). But even if these sketches can be made adequate for utilitarian purposes, there is too much resilient disagreement among morally reflective people to allow democratic governments to determine benefits and burdens entirely by utilitarian standards.[20]

If utilitarian considerations alone do not suffice to determine when a healthcare requirement unwarrantedly restricts religious liberty, neither do considerations from any comparably simple ethical view (if there is such a view among the most plausible candidates, including Kantian ethics, Aristotelian virtue theory, and Rossian intuitionism). But on any plausible view, considerations of pleasure and pain are important. Economic factors can roughly indicate these, but the incommensurability problem cannot be solved using economic criteria to compare the value of a healthcare requirement against that of a religious liberty it abridges. This is especially so where citizens differ greatly in wealth. One person's pin money is another lifeline.

If political philosophy is to guide such governmental and institutional decisions as the contents and scope of healthcare in a society, it must respond to what seems an irreducible plurality of values. Among these are the central default values for morally sound democracies: liberty, limited only by considerations of harm, and basic political equality, requiring one-person, one-vote and equal treatment before the law. More specifically, in church-state matters we have identified at least six standards for public policy.

Standards for Guiding Religiously Controversial Healthcare Policy

The first three standards are the liberty, equality, and neutrality principles. Governmental adherence to these may require policies that differentially benefit religious people and institutions, depending mainly on the religious composition of the citizenry. But differential benefit does not necessarily indicate preferential treatment.

20. Rawls went further in (1971); but we need not agree that no compromises in liberty are justifiable by gains in utility to justify holding that utilitarian considerations are not alone adequate to decide when a healthcare requirement may override a prima facie justified religious liberty claim. That they are not, however, is not entailed by the church-state principles proposed above; in particular, governmental neutrality toward religion leaves open the scope of governmental neutrality toward ethical theories. Cf. Rawls's case in (1993) for governmental neutrality toward "comprehensive views" of the good.

Sociopolitical injustice may not be inferred simply from differences in benefits or prosperity.

Fourth, with these three principles governing church state-relations in mind, and given that governments should seek to reduce the alienation and resentment that can result from differential benefits, I have proposed the *protection of identity principle*, on which the deeper a set of commitments is in a person, and the closer it comes to determining that person's sense of identity, the stronger the case for protecting the expression of those commitments. This bears on the difference between requiring coverage for ordinary contraceptive services and requiring it for what are conscientiously believed to be abortifacients.

Fifth, beyond these points, we have seen that in determining what limitations of religious liberty are permissible in the framework described, governments should distinguish orders and kinds of coercion. Other things equal, the need for justification of governmental coercion is inversely proportional to its order.[21] A related principle (which supports the former) is that, other things equal, coercion to do something requires stronger justification than coercion to give indirect support, as by paying taxes, to someone else's doing it. For reasons indicated above, this applies to individuals and non-governmental organizations such as universities, as well as to governments.

Sixth, a lesson of our discussion of double effect indicates that, negatively, a limitation of liberty , such as requiring religious employers to adopt a healthcare plan they object to, is not necessarily justified when it is a collateral consequence of doing something whose value outweighs its disvalue, say guaranteeing adequate healthcarfe for all citizens. A plausible principle of double effect would apply only where there is no preferable way to achieve the greater value—such as using vouchers to guarantee adequate healthcare to all employees—without the bad consequence. A major problem here is to determine what alternatives are preferable. For instance, how far should governments go in using tax revenues to avoid burdening free exercise? In such cases preferability may be taken to be in part a matter of majority vote: in democracies, majority vote is a prima facie normative reason for government to realize the preferred state of affairs.

One further consideration should be brought to the fore. No adequate set of standards to guide public policy can be so precise and so clear in its requirements

21. Other things are not equal in at least some cases where the coercion is second order. Forcing x under threat of death to force y to kill z would tend to be even worse than just forcing y to do it. It seriously wrongs, and violates the rights of, one more person.

that morally responsible conduct by individual citizens—especially if they are legislators, judges, or executives—is not needed for the flourishing of the society as a whole. With this in mind, I have proposed, especially but not solely for the domain of church-state relations and matters of religious liberty, a *principle of secular rationale*—alternatively (in ideologically neutral terms) *the principle of natural reason*: Citizens in a free democracy have a prima facie obligation not to advocate or support any law or public policy that restricts human conduct, unless they have, and are willing to offer, adequate secular reason for this advocacy or support (e.g. for a vote).[22] This principle is in no way anti-religious; it simply states a (defeasible) necessary condition for justifying coercion. The condition is one that even religious people should accept insofar as they consider impartially the alienating repugnance of being compelled to do something for reasons tied to someone *else's* religion.

It should be obvious that citizens internalizing this principle will tend to support government's adhering to the other principles proposed above. It is of course not obvious what counts as an adequate reason, but this is a general problem for normative decision-making and needs no special treatment here. The principle is one that many religious people seem guided by even if only at the level of presupposition. Many, especially in the Roman Catholic tradition, try to find good arguments not dependent on theology at least where they burden other citizens. Natural law arguments are often thought—controversially, to be sure—to have this status.

The principle of secular rationale may seem to imply that religious reasons have no normative force or at any rate may be ignored in the ethics of citizenship. This is not so, and a plausible companion principle addressed to religious citizens is *the principle of religious rationale*: Religious citizens in a free democracy have a prima facie obligation not to advocate or support any law or public policy that restricts human conduct, unless they have, and are willing to offer, adequate religious reason for this advocacy or support. This principle admittedly might burden some of the political activities of some religious people; but the obligation is prima facie, and where a religion does not bear on an envisaged law or public policy, either the prima facie obligation is overridden or the principle may be considered inapplicable. The principle would, from

22. This formulation is from my (2000), p. 86, though published much earlier (1989). The principle has been widely discussed, e.g. by Eberle in (2002), esp. 84-151. My earlier formulations used 'free democracy' since I assumed that a significant degree of freedom is entailed by what I call a (normatively) sound democracy and certainly by a liberal democracy. *Some* minimal political freedom is required for any democracy, but there is no reasonable way to specify a minimal level with exactitude. In any case, the phrase 'free democracy' is not needed here: even in a democracy barely deserving the name the principle would hold, even if the prima facie obligation were weaker than in a liberal democracy.

some religious perspectives, support considering unequal healthcare coverage invidious. That conclusion could, for instance, be considered implicit in "Do unto others as you would have them do unto you." Similarly, suppose the morning after pill is considered an abortifacient on religious grounds such as clerical pronouncements. Would rejecting its inclusion in a comprehensive healthcare policy on those grounds violate the Do-unto-others rule, at least for those who would resent burdens on their exercise of freedom owing to pronouncements of clergy in some religion not their own? Whatever the answer, those abiding by the secular rationale principle would tend not to reject its inclusion at least if governmentally funded. This leaves open, of course, whether, for government, it is (as I have suggested) *better* to cover such cases directly rather than requiring employers to do so, even if the relevant funds are given to them for distribution. If healthcare is nationalized, however—a policy change that, for the U. S., at least, raises issues not addressed here—there is little question that the framework of this paper would indicate the desirability of including that pill along with other contraceptive services.

Democracy is a negotiatory framework. The preservation of liberty and equality are essential if it is to realize the ideal of government of, by, and for the people. Coercion by laws and institutional policies should be minimal. Where standards of healthcare or other elements of the well-being of the populace must be guaranteed, persuasion is better than coercion. This paper presents a framework for guiding, and indeed for minimizing, coercion in church-state matters when it is necessary and for engendering persuasion in those matters where persuasion is possible. Toward these ends, I have proposed a number of connected principles: for the institutional realm, three principles of separation of church and state, a principle concerning the protection of identity, and another concerning the justification of coercion at different levels; for the realm of individual citizenship, principles of secular rationale and religious rationale. My hope is that, taken together, these principles may guide governments and institutions and enhance both the liberties and the moral standards of individual citizens.

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Taking Humour (Ethics) Seriously, But Not Too Seriously

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ABSTRACT

Humour is worthy of serious ethical consideration. However, it is often taken far too seriously. In this paper, it is argued that while humour is sometimes unethical, it is wrong much less often than many people think. Non-contextual criticisms, which claim that certain kinds of humour are always wrong, are rejected. Contextual criticisms, which take issue with particular instances of humour rather than types of humour, are more promising. However, it is common to overstate the number of contexts in which humour is wrong. Various mistakes of this kind are highlighted and cautioned against.

INTRODUCTION

Although humour[1] is the very opposite of seriousness, perceived breaches of humour ethics are often taken very seriously. Some people go so far as to think that purportedly errant humourists should be killed. This was the reaction, for example, of some people to the Danish cartoonists whose cartoons depicted the prophet Mohammed (For a discussion on the ethics of the Mohammed cartoons, see Benatar 2006). Various regimes, including Nazis and the Soviets, have severely punished humour directed towards them (Peukert 1993, 198; Lewis 2006; Nesbitt 2000).

The humourless reaction to humour is not restricted, however, to fundamentalist Muslims and tyrannical regimes. Even in liberal democracies many citizens are outraged at what they take to be breaches of humour ethics, even if their reactions are not as severe. For example, a philosopher at the University of Wales, Swansea, resigned from that university in response to a barrage of criticism after he told jokes "with sexual overtones" at a Department Christmas party (Goldstein 2002). A United States National Security Advisor, James L. Jones, was taken to task for telling a joke, at an anniversary gala of the Washington Institute for Near East Policy, about a Taliban militant and two Jewish businessmen (Guttman 2010). There were calls for the resignation of David Letterman after he joked about Sarah Palin's daughter, who advocates pre-marital abstinence but is herself an unwed mother (Cohen 2009). A professor at the United States Merchant Marine Academy faced the prospect of being fired for a humorous quip that referenced the Colorado movie theatre shooting[2]. In

1. Humour includes not only jokes but also comedy, cartoons, satire, quips, puns, comic impersonations and so forth. I shall sometimes refer to "jokes" or one of the other forms of humour without always meaning to restrict my comments to that particular form of humour. I do not propose to provide a definition of humour. Defending one definition over rivals would be a massive undertaking, well beyond the scope of this essay. Even stipulating a definition would be ill advised and make little or no difference to what I have to say. The word "humour" can be used in different senses. A definition covering all reasonable senses would either have to be so general as to cover all senses or it would have to be a disjunction of all (reasonable) meanings. That said, it should be clear from the context of what I shall say that when I use words like "humour" or "joke" I am excluding bizarre cases where people find humour in something that fails to meet the (minimal) aesthetic conditions to count as humour. One such bizarre case would be somebody opening up a mathematics textbook, seeing an equation and laughing, where there are no contextual considerations that would explain why the equation met the relevant aesthetic conditions. While we can say that this person "found the equation humorous", when I use the word "humour" (and "joke") in this paper, I am not using the term so broadly as to include the equation that this strange person finds humorous. I am not denying that the word *can* be used in this way. It is just that I am not using it that way here. I shall not stipulate what the aesthetic conditions are for something to count as humour. That too would take me beyond the scope of the current paper and would unnecessarily tie my analysis to a particular view. My analysis of humour ethics is compatible with a wide range of views about what the relevant conditions are.

2. While showing a film during a class, eleven days after the shooting, he said "If someone with orange hair appears in the corner of the room, run for the exit". (Berrett 2012)

the end he was instead given a 45-day suspension and was required to undergo five hours of "sensitivity training" (Kaminer 2012). And a comedian in New Zealand had to resign from his radio and television jobs after he made a joke about homosexuals and Jews being expendable (Haaretz Service and DPA 2010).

Not all humour is thought to be morally problematic. Much humour is taken to be innocent and beyond reproach. Ethical questions are typically thought to arise in certain predictable categories of humour. One such category consists of racial, ethnic and gender humour – including jokes about "blacks", Jews, Poles and women. Another is humour about God, religious figures (such as Mohammed) and other sacred matters. We might refer to this as blasphemous humour. Scatalogical humour is a third category, which includes jokes about genitalia, sex, urination, defecation, menstruation and other bodily effluvia. Humour about death and suffering – what we might call morbid or tragic humour – includes dead baby jokes, and making light of the Holocaust, famine and disease. Another category of humour that raises ethical concerns is humour about people's personal attributes – such as their big ears or noses, their short or tall stature, or their mental or physical disabilities. Finally, there are so-called practical jokes (such as the "candid camera" variety) in which the victims are "set-up" without their knowledge in order to provide entertainment for others, and the related phenomenon of comic pleasure from people's (un-engineered) misfortunes.

Although I think that humour can be and sometimes is morally wrong, it is not wrong as often as popular wisdom suggests[3]. And when it is wrong, it often is not as serious a wrong as many people would have us believe. In arguing for this conclusion, I shall evaluate various views people seem to hold about the ethics of humour.

My argument will make mention of various jokes that some people may take to be offensive. This is unavoidable without compromising the quality of the argument. A proper discussion of the ethics of humour cannot avoid all reference to the very jokes that some people take to be unethical. In other words, I am not telling the jokes

3. When I say "popular wisdom" I am referring, as the above examples should make clear, not to the views of philosophers or other theorists about the ethics of humour but to the views of the broader population. Some philosophers also have (what I take to be) overly restrictive views on the ethics of humour, and I shall make reference to them too, but my interest is not limited to what philosophers say about humour ethics. I seek to address views that are held much more widely. Of course, what constitutes "popular wisdom" varies, both geographically and temporally. I am referring to views that are held widely in some or other part of the world in our own times.

but mentioning them in order to discuss them[4]. Readers who are prone to offense at the mere mention of a joke are advised not to read any further. Caveat lector!

Humour is subject to ethical criticism on at least two grounds. First, it is often thought to arise from a moral defect either in the person purveying the humour or in the person who enjoys it. The focus here is on an agent, whether it be the person telling or appreciating a joke. The other main way of criticizing humour is by focusing on the joke rather than on those telling or laughing at it. Those who fault humour in this way usually do so because of the (wrongfully inflicted) deleterious effects of the humour in question. However, in some select cases, a piece of humour is faulted not because of its effects but rather because of some inherent feature of it[5].

It is worth noting that the stated flaws are not mutually exclusive. For example, a joke could reflect some moral failing in its teller while also having negative effects. In fact, one flaw might often lead to or explain the other. Thus, if a particular telling of a joke expresses a vice of the joke teller, the joke might, on that basis, have deleterious effects it would not otherwise have. For instance, a joke prompted by malice might cause harm that the same joke offered without any malice would not. Alternatively, the fact that a joke can be expected to have harmful effects on those who do not deserve those harms might sometimes lead us to think that the telling of the joke is an expression of either indifference or malevolence on the part of the joke's teller.

Another way to classify the moral criticisms of humour is to distinguish between contextual and non-contextual criticisms. Non-contextual criticisms take issue with a joke irrespective of its context. The criticism is of a type of joke, which is thought to be wrong irrespective of its context. Contextual criticisms, by contrast, are those that criticize not the joke itself but rather a contextualized instance (or token[6]) of it. In what follows, I shall discuss both non-contextual and contextual evaluations of humour and will show how the earlier distinction between different grounds for criticizing humour maps onto this distinction.

4. Philosophers distinguish between the "use" of a term and the "mention" of it. If you call me a moron, you are using the using the word "moron". If, by contrast, you say "Bob called you a moron" you are mentioning the word "moron". I am mentioning rather than using (or telling) jokes.

5. This last distinction is not the distinction between consequentialist and deontological assessments of humour. This is because a deontological assessment can cut across these two kinds of faults. Criticizing a joke because of some inherent feature of it does appear to be a deontological assessment. However, because a determination of whether deleterious effects are wrongfully inflicted can be made in a deontological way, faulting humour on account of its effects isn't always a consequentialist matter.

6. The type-token distinction is a technical philosophical one. Those unfamiliar with it may, without cost, ignore the reference to a token.

The various relationships are graphically represented here:

Two grounds for assessing the ethics of humour			
Agent (Humourist or appreciator)		Humour	
Some categories of humour always express a defect in the agent.	Some instances of humour express a defect in the agent, but others do not.	Humour itself	Effects
Non-contextual	Contextual	Non-contextual	Contextual

NON-CONTEXTUAL CRITICISMS

Criticizing humour because of a moral defect in the people purveying or appreciating it can be either contextual or non-contextual. It should be obvious that humour is at least *sometimes* the product of a character defect. Sometimes jokes about racial or ethnic groups or about one or other sex are told or enjoyed because the teller or the audience is prejudiced towards the group that is the butt of the joke. Blasphemous, scatological, tragic and personal humour, as well as practical jokes are sometimes delivered or enjoyed because of insensitivity, maliciousness or cruelty.

The key question is how often these kinds of jokes are the product of character defects. Some of those writing on the ethics of humour have held the extreme view that in the case of some kinds of humour, the answer is "always". With respect to these kinds of humour, their critique is non-contextual. It is not that one of these kinds of jokes is acceptable in some circumstances but morally wrong in others. Instead, it is, on this view, always a product of some or other vice.

For example, some people have argued that jokes that turn on negative racial, ethnic or gender stereotypes *always* reflect badly on those who enjoy them. The suggestion is that one cannot enjoy a joke that turns on a stereotype without actually

endorsing the stereotype (de Sousa 1987)[7]. It is not possible, on this view, to adopt the prejudicial attitude hypothetically. To laugh at a joke about women, Jews or "blacks", is to show you up as, respectively a sexist, anti-Semite or racist.

Arguments for this conclusion ask us to introspect. They suggest that if we do, we will find that "we intuitively know that sharing [the joke's assumptions] is what would enable us to find the joke funny"[8] (de Sousa 1987, 240). This claim is problematic. If we assume, for the moment, that introspection is a reasonable methodology, we find that many honest introspectors simply do not find that they share the prejudicial assumptions of the jokes they enjoy. They find instead that they can enjoy a joke that employs a stereotype of a particular group of people without actually endorsing that stereotype. Consider, for example, the following joke:

> *A Jew, a Scot and an Englishman have dinner together at a restaurant. After the meal, the waiter approaches them and asks to whom he should present the bill. The Scot says: "I'll pay". The headline in the newspaper the next morning reads: "Jewish ventriloquist found dead in alley".*

Stereotypes about Englishmen are inert in this joke, but the joke does turn on stereotypes about Jews and Scotsmen. According to the stereotypes both groups are tightfisted. But this purported attribute is combined with canniness in the Jew and a propensity to violence in the Scot. The wily Jew, intent on avoiding payment for the dinner, cleverly tries to get the Scot to pay. The Scot, equally unwilling to pay, (over-) reacts by killing the Jew.

At least some people find that they can enjoy a joke of this kind even though they are as confident as possible that they do not endorse the underlying stereotypes. To this it might be objected that the joke would be less funny if it had been an Englishman who said he would pay and an American ventriloquist who had been found dead in an alley. In that version one might see the point of the joke but one would not find it as funny, even if the relevant stereotypes were stipulated in advance of telling the joke. The suggestion is that this shows that we do indeed need to endorse the underlying stereotypes to find the joke funny.

7. Ronald de Sousa's view is endorsed by Merrie Bergman (1986). Claudia Mills also seems to endorse this view (1987)

8. The particular joke that he uses as an illustrative example is a very weak rape joke. I have elsewhere (Benatar 1999) provided a detailed response to his musings about that joke and I shall not repeat them here.

However, this objection overlooks the fact that actually *endorsing* the stereotypes is not the only alternative to merely *stipulating* them. Intermediate between these is *recognizing* stereotypes and this may well be sufficient to enjoy the joke (Benatar 1999). This is not to deny the possibility that there are those who find the joke funny because they do endorse the underlying stereotypes. Instead, it is to say that endorsing the stereotypes is not necessary in order to enjoy the humour. Introspection suggests that one can, and some people do, enjoy such jokes without endorsing the stereotypes, in which case jokes turning on a racial, ethnic or gender stereotype are not always tainted by flaws in the person recounting or enjoying the joke.

So far I have been assuming that introspection is a reasonable methodology for determining whether endorsing a stereotype is necessary for appreciating humour that turns on that stereotype. Against this assumption it might well be suggested that introspections are unreliable because even honest introspectors may be unaware of their implicit biases. However, if the introspective method is unreliable then those claiming that one cannot enjoy a joke that turns on a stereotype without actually endorsing the stereotype cannot appeal to introspections to make their case. Nor is it sufficient for them to point to the numerous studies that have shown that implicit biases are widespread. They need to show that it is the presence of an implicit bias that causes the relevant humour to be appreciated. For if it were the case that somebody had an unconscious prejudice but this played no role in appreciating a particular piece of humour, it would not be the case that the humour appreciation were an *expression* of the prejudice. In short, those who claim that appreciating humour that turns on a stereotype is always an expression of prejudice cannot simply make that claim. They need to provide evidence.

Just as jokes that turn on stereotypes do not seem always to be an expression of a defect in those who appreciate the jokes, so jokes about the ugly or the disabled, or about violence, rape or death, do not seem *always* to arise from insensitivity or cruelty in the person telling or enjoying such jokes. Such vices may explain why some people like jokes of these kinds, but for others the appreciation of such jokes is explained in other ways. For some people it arises from the opposite character traits. It is precisely because of their sensitivities or anxieties about the sufferings and misfortunes that they seek relief in lightheartedness about these serious matters. Think, for example, of the old man who says, "When I awake in the morning, the first thing I do is spread my arms. If I don't hit wood, I get up." Such a quip does not indicate that the old man regards his death as a trivial matter. Instead, it is his anxiety about death (and inter-

ment) that gives rise to his humour. While this is a case of self-directed humour, there is no reason to think that something similar is not sometimes occurring when people joke about the tragedies that befall others. Such tragedies can cause us anxiety, and humour is one way in which we can deal with them.

Thus we see that to joke about something is, contrary to what some people think, not necessarily to trivialize it. When jokes are told about serious matters, we are not necessarily treating these matters as though they were not serious. We can laugh at the serious, and sometimes we do so precisely because we recognize it to be serious.

However, saying something in jest is not the same thing as saying it seriously. Indeed sometimes a joke or a skit or some other piece of humour is found to be funny precisely because it could never be said in seriousness (without exceeding the bounds of civility).

It is not merely the contemplation of the transgressive that explains why some people find some jokes about nasty subjects funny. Rape jokes, for example, might include amusing incongruities that are enjoyed even by those who do not have morally defective views about rape.

Another non-contextual moral critique alleges that some kinds of humour are always tainted, not because of a defect in those spreading or enjoying it, but instead because of a defect in the humour itself. It is arguably the case that this claim is made about very few types of humour. Perhaps the clearest example is (purportedly) blasphemous humour. Although those concerned about such humour might take blasphemers to be morally defective, their basis for objecting to the humour lies not in the blasphemer but in the blasphemy. Humour that "takes the Lord's name in vain" or that irreverently depicts the sacred, or, in some cases, depicts God or a prophet in any way, is thought to be wrong[9].

Arguments that a particular type of humour is always wrong because it is blasphemous are deeply controversial. This is because they rest on highly contested premises. They assume not only that God exists but also that blasphemy is morally wrong (as distinct from being prohibited on non-moral grounds) and that a particular piece

9. There are many examples of people taking humour to be wrong on the grounds of it being (purportedly) blasphemous. The *Jyllands-Posten* publication of the Mohammed cartoons is one infamous case. Millions of people around the world took the cartoons to be wrong for this reason. Nor were all these people themselves Muslims. Journalist Charlene Smith claimed that "never, ever, should we blaspheme a person's God or goddess" (Smith 2006) In another, less well-known case some Christians in South Africa objected to what they took to be blasphemous humour in a University of Cape Town student humour magazine. (Naidoo 2009). These complaints led to the magazine being withdrawn from the shelves of a major chain of shops, and to an apology from the University of Cape Town.

of humour constitutes blasphemy. Atheists, of course, will deny the basic assumption of God's existence, and the other assumptions fall like dominos in consequence. However, even theists, who agree about God's existence, can disagree about the other assumptions and especially the final one. There is wide variation in the views of religious people about what constitutes blasphemy and blasphemous humour. Some are much more permissive than others. For these reasons, the non-contextual moral critique of blasphemous humour is hard to defend and I shall not discuss it further.

CONTEXTUAL CRITICISMS

It should not be surprising that non-contextual criticisms of humour are harder to defend. They make more expansive claims than contextual criticisms do. More specifically, they say that *all* humour of a particular kind is morally wrong. Such claims are hard to believe. Much more plausible is the view that various kinds of humour can be morally acceptable in some contexts but wrong in others. On this view, we should not be evaluating types of jokes but rather particular instances of a joke to determine whether they are morally permissible.

The thought that humour can be wrong when it stems from a defect in the person telling or appreciating a joke, is a contextual critique when a particular instance of a joke is faulted not because all jokes of that type are thought to stem from a personal defect but rather because that particular instance of it is thought to do so. In other words, telling joke J could be wrong for person P (because J would reflect a defect in P) even though it would not be wrong for person Q (because J would not reflect a defect in Q).

A defect in the joke-teller is not the only basis for a contextual criticism of humour. The other basis arises when an instance of humour is thought to inflict a wrongful harm. Because a given joke can be harmful in some situations but not in others, and because where it is harmful the harm is permissibly inflicted in some circumstances but not in others, a contextual critique makes reference to the particular circumstances in which a joke is told.

Humour only rarely causes physical harm, at least directly. Some kinds of practical jokes would be the most likely of the various types of humour to cause such harm (and are also the kind of joke most easy to fault). Imagine for example, the practical joker who contrives to cause somebody to slip or fall for the amusement of others. Such actions could be physically injurious. It is arguably somewhat more common

for humour to cause physical harm *indirectly*. Consider, for example, a case of somebody who responds violently to a piece of humour that he finds offensive. The violent reaction to the Mohammed cartoons in the Danish *Jyllands-Posten* newspaper is a possible example (Benatar 2008). Of course, it is not uncontroversial in such cases to say that the humour *caused* the violence. This is because the intolerant, violent reactor has a choice about how to react to the humour. He is not caused or forced to react violently. Nevertheless physical harm can be an indirect effect of humour.

The most common harmful effects of humour are not physical. When humour harms, the harms are typically psychological, including offence, embarrassment, shock, disgust and the feeling of being demeaned or insulted. Humour is sometimes also thought to inculcate, spread or reinforce negative attitudes about those individuals or groups that are the butt of the humour[10]. Such attitudes might themselves be thought to be harmful. At the very least, they might be thought to pose the risk of causing harm to those toward whom the attitudes are held.

COMMON MISTAKES IN HUMOUR ETHICS

In assessing the effects of humour, common thinking about the ethics of humour is prone to a number of mistakes.

The Benefits are Ignored

First, the focus tends to be (almost) exclusively on the *negative* effects. Of the positive effects that are overlooked, the most obvious is the pleasure that humour brings. Where critics of humour do consider the pleasure, this often forms part of the critique. The suggestion is that there is something wicked about taking pleasure in humour that also has the negative effects. Obviously such a critique is sometimes apt. Sometimes it is wicked to laugh at the expense of another. However, it is not always wrong. One can better see why this is the case if one considers some of the other benefits of humour.

For example, humour is a powerful tool that can be wielded against those who abuse power (There are many people, of course, who do not overlook *this* benefit.

10. For example, South African President Jacob Zuma believes that he has been demeaned by cartoonist Jonathan Shapiro (aka Zapiro), and jokes about racial or ethnic groups have been said to exacerbate stereotypes about those groups.

However, there are many others who do. This includes not only those who abuse power but also their many supporters). Tyrants have no moral complaint when others, and especially those they oppress, laugh at them. It is because of humour's subversive power that many a despot has sought to prohibit humour that mocks him or his associates. For example, in Zimbabwe it is a criminal offence to ridicule the President, Robert Mugabe.

Here is an example of one anti-Mugabe joke:

> *A man is caught in a traffic jam when someone taps on the car window. The driver lowers the window and asks what he wants. The other man says, 'President Mugabe has been kidnapped and the ransom is $50-million. If the ransom is not paid, the kidnappers are threatening to douse the president with petrol and set him on fire. We are making a collection. Do you wish to contribute?' The man in the car asks, 'On average, what are people donating?' The other replies, 'About two or three gallons'*
>
> (*The Herald* 2006, 6)

Sometimes the oppressed begin to joke about the risks of joking. Here is one example from the Third Reich:

> *What is fratricide?*
>
> *If Hermann Goering slaughters a pig.*
>
> *What is suicide?*
>
> *If someone tells this joke in public.*
>
> (Lipman 1991, 52)

Other repressive regimes have been a little less sensitive about satire. In such cases humour can serve the function of conveying (sometimes scathing) criticism in a form that is more palatable to those being satirized. It is often the case that a true and critical word spoken in jest is tolerated more readily than a true and critical word spoken in seriousness would be. South African comedian, Pieter Dirk Uys,

lampooned Apartheid and Apartheid-era politicians (as he does post-Apartheid politicians) with relative impunity[11].

This phenomenon does not occur only at the political level. Even in inter-personal relationships, criticisms offered in jest are often more agreeable than criticisms offered in earnestness. And it is because we all have our foibles that others may sometimes joke about us. Thus it is not only tyrants who have no justified complaint about being the butt of a joke.

Humour has other benefits too. It can puncture pretentiousness, and lighten mood. It can help people cope with their anxieties – about disease, disability and death, for example. It is often the case that when people joke about these things it is not because they are failing to take them seriously, but instead precisely because they do take them so seriously. Tragedies often breed dark humour. Think, for example, of the flurry of jokes that were generated in response to the Ethiopian famine, the space shuttle disasters, the death of Diana Spencer, and the O.J. Simpson murder trial following the killing of Nicole Brown Simpson and Ron Goldman. Humour also flourishes in circumstances of adversity, enabling people to battle the ill-effects of being victimized, oppressed or persecuted. Soviet citizens joked about the USSR, mocking the repression, the inefficiencies, the drabness, and the shortages. Jews joke about anti-semitism, and "blacks" joke about racism. The dynamics vary. Sometimes a group that is stereotyped employs jokes embodying the stereotype in an attempt to neutralize the potency of the stereotype. More rarely, the stereotype becomes the butt of the joke. Consider the following joke, which has has two variants. The Jewish variant reads:

> *Two Jews are walking down a street and see a sign on a church saying: "Become a Christian and earn $100". They don't know what to make of this, but decide that one will convert and will share the money with the other. The prospective convert enters the church. After a while he emerges. His friend says to him:*
>
> *"Where's my $50".*
>
> *The new Christian replies: "Is that all you people think about?"*

11. If my memory serves me correctly, one cabinet member, Piet Koornhof, even (knowingly and freely) participated in one of Mr Uys' films.

The "black" variant reads:

Two "blacks" are walking down a street and see a sign on a building saying: "Become white and earn $100". They don't know what to make of this, but decide that one will become "white" and will share the money with the other. The prospective "white" enters the building. After a while he emerges. His friend says to him:

"Where's my $50".

The new "white" replies: "Get yourself a job!"

These versions of the joke rest on a recognition of stereotypes about Jews and "blacks", but the butt of the joke is not the Jew or the "black". Instead it is those who hold the stereotypes about them.

The joke (in its two forms) is instructive in a variety of ways. First, it provides further support for the point I made earlier that one does not have to endorse a stereotype in order to find funny a joke that turns on that stereotype. Second, the fact that a joke incorporates a stereotype does not mean that it reinforces or spreads that stereotype. It could instead subvert the stereotype. Third, although the butt of the joke is, respectively, those who hold stereotypes about Jews and "blacks", this does not mean that Christians and "whites" are being stereotyped as stereotypers. One does not have to think all (or even almost all) Christians or "whites" have these attitudes in order to find the joke funny. One need only be aware that there are (or have been) many Christians and "whites" who have held these views.

Contextual Considerations are Oversimplified

Many people recognize that context is crucial for determining when a joke expresses a defect in the joke-teller, but a common view about humour ethics tends to oversimplify the contextual considerations. For example, it is often thought that jokes about "blacks", Jews, women, Poles, or the disabled, for example, are morally tainted unless they are told by members of the group that is the butt of the joke. Some go so far as to say that unless one is a member of the group about which one is joking, telling the joke is wrong. This view is correct in asserting that the identity of the joke teller is relevant to a moral assessment of a given telling of a joke. Depending on who

is telling a joke, the joke either is or is not an expression of a defect in the joke teller. However, where the view is wrong is in claiming that only group-insiders may tell jokes about the group. What it seems to assume is that all and only group-insiders can tell the joke without either (a) the joke being an expression of a defective attitude or (b) its being viewed as the expression of such an attitude.

However, neither of these assumptions can be supported. First, it is possible for group-insiders to share defective attitudes about the group. It is not uncommon for people to internalize prejudices or other negative attitudes towards a group of which they are members. When such group-insiders tell jokes about their group they may well be exhibiting the same attitudes as prejudiced people outside the group. If a joke is morally problematic because it expresses some defect in the joke teller, then the telling of a joke about "blacks", for example, is wrong if the person telling it is a "black" who shares that defect.

Second, because of this phenomenon we cannot assume that group-insiders will not be viewed (at least by those with a more nuanced view of human psychology) as expressing the problematic attitudes.

Third, there are situations in which we can be confident that the joke-teller does *not* share the negative attitudes even though he or she is *not* a member of the group about which the joke is being told. Sometimes we know somebody sufficiently well – or we know that those to whom we tell a joke know us sufficiently well – that the telling of the joke will not be viewed as an expression of a bad attitude.

Thus, while the identity of the person purveying some piece of humour is clearly a relevant contextual consideration, it should not be reduced to the crude principle that all and only group-insiders may joke about the group.

Another contextual consideration is the identity of those to whom the humour is directed, namely its audience. This consideration too is oversimplified – and in a way that connects with the identity of the humourist. Thus it is often thought that if a group-insider tells a joke to fellow group-insiders, the humour is innocent. However, if the same joke is told to those outside the group being joked about, then the joke telling is morally suspect, whether or not the teller is a member of the group. The thought seems to be that telling a joke about "blacks", for example, is not likely to inculcate or reinforce anti-"black" attitudes in "blacks", or that there is something less troubling about a disabled person laughing at disability than there is about an able-bodied person laughing at the same joke.

While this view contains some truth, it too is insufficiently refined. It probably is

true that group-insiders, although not immune, are often less prone to adopting negative attitudes towards the group. Moreover, it does seem true that self-deprecatory humour is less worrying than humour that deprecates others. Nevertheless, because people can enjoy jokes about others without having or coming to have negative attitudes towards those people, we cannot assume that it is always impermissible to tell a joke about a group to those not in the group.

A third contextual consideration is the identity of the group *about which* (rather than *to which)* the joke is told. The conventional wisdom here is that there is no problem telling jokes that are critical of men but that there is a presumption against telling jokes that are critical of women. Similarly, while it is acceptable for "whites" to be the butt of a joke, telling jokes about "blacks" is presumptively wrong. The rationale seems to be that subordinate groups are more vulnerable than dominant ones and that laughing at the "underdog" is morally problematic in a way that laughing at dominant groups is not.

Again, there is an element of truth to this view. Telling jokes about some groups is more likely to cause harm than telling jokes about others. But this does not mean that telling jokes about historically disadvantaged groups always (wrongfully) harms, or that telling jokes about historically advantaged groups never (wrongfully) harms. For example, jokes about "whites" might be more dangerous in Zimbabwe than they are in Sweden, and jokes about male nurses may be more damaging than jokes about female doctors.

Offence is Given Too Much Weight

Possibly the most common mistake made in thinking about the ethics of humour is to treat offence either as a decisive moral consideration or, at the very least, as a very strong moral consideration. It is often thought that because a piece of humour offends somebody it is therefore wrong or is at least presumptively so. Variants on this view claim that offence must either reach a certain level of intensity, or be sufficiently widespread, or must result from a violation of particular sensibilities – usually religious ones – in order to be judged wrong.

When this view is stated bluntly, as I have just stated it, it sounds untenable. It might be wondered, therefore, whether anybody really makes the mistake of thinking it true. Because the argument is rarely stated explicitly it is hard to *prove*, at least without probing people, whether they are in fact espousing such a view. However, it

does seem reasonable to attribute the view to those who, in criticizing an instance of humour, refer to its offensiveness and say nothing more[12]. There are many examples of this[13].

What tends to happen is that people express their outrage at a piece of humour (or people note that others are outraged about it) and they infer that the humour must be wrong. Alternatively, it is noted how many people are outraged or how intensely outraged people are, and it is assumed that there must be a good reason why so many people are upset or why people are so upset. However, in the absence of a justification for the outrage, it is the outrage itself that is doing the work of (purportedly) justifying the claim that humour is wrong. In other words, it is one thing to say that humour is wrong for such and such reasons, and people are outraged because it is the sort or wrong that elicits justified offence. It is another thing to say that the humour is wrong because people are outraged by it.

All versions of the view that humour is wrong because it causes offence are problematic. If the view were correct then it would grant a moral veto to the hypersensitive (Benatar 2009). Those easily offended or outraged would be able to render instances of humour immoral. That, in turn, would imply that there is no difference between warranted and unwarranted outrage – or at least that the distinction is irrelevant to our assessment of the ethics of humour. If would assume that people always have a moral right not be offended. It would also ignore the fact that humour that offends some people can bring more important benefits to others. Finally, offence arguments can be two-edged swords that produce judgments that if not contradictory are certainly in tension with one another. Thus A might be offended by B's joke,

12. Where they do add something but all they add is about the intensity of the offense or about religious sensibilities having been offended, they seem to be advocating one of the variants of the offence argument to which I referred in the previous paragraph.

13. Here are just a few: Afzal Ahmad, Chairman of the American Islamic Association, in a letter to *The New York Times* said he found the *Jyllands-Posten* cartoons "both hurtful and offensive". The only other thing he said in criticism of the cartoons was: "In my view, freedom of speech in a public arena carries with it a huge responsibility not to malign people's deeply held religious belief systems." (*The New York Times* 2006) This suggests that he is advancing the version of the offence argument that objects to offending people's religious beliefs. Criticizing the same cartoons, Kofi Anan, then Secretary General of the United Nations, said "I share the distress of the Muslim friends who feel that the cartoon offends their religion" (Brinkley and Fisher 2006). If Mr Anan said more, it was not quoted by *The New York Times*, suggesting that either he or the newspaper took the point about offence to be the heart of the criticism. At a performance in Johannesburg, comedian John Cleese told a joke about a tour group to the Dachau concentration camp that arrived too late in the day to be admitted. The joke's punch line was that somebody in the group, hearing that they had been refused entry, said: 'Tell them we are Jewish'. Some Jewish members of Mr Cleese's audience took exception. One said that it "is truly offensive and (Cleese) should know how we feel" (*South African Jewish Report* 2013). That was the only criticism attributed to that complainant. Again, either the complainant said no more or the reporter was of the view that this captured the essence of the complaint.

but B might be offended by A's offence – that is, by his humourlessness. If offence is a sufficient condition for rendering immoral the conduct that generates the offence then although B's joke is immoral, so is the very reaction of A that makes the joke immoral.

Although offence is not a very weighty moral consideration against telling a joke, this does not mean that it is irrelevant. The fact that one's humour would cause others offence is often something we must take into account. That consideration will regularly be overridden but there are times when it will not be outweighed by other considerations. The clearest scenario is where the offence is gratuitous – where the offending humour produces no benefit to redeem it. It would be wrong, for example, to tell crude jokes to prudes if *all* that this achieved was the mortification of the prudes.

JUDGING JOKES

How can we judge (prospectively) when we may tell a joke and when we may not? How can we judge (retrospectively) whether some humour that has been disseminated should instead have been withheld?

It should be obvious that no formula can be provided. If, as I have suggested, the non-contextual criticisms of humour are defective, we cannot even say that some kinds of jokes should never be told. Instead any judgment will need to take into account the specifics of a given joke in a given context. Drawing on the earlier discussion, a few general guidelines can be provided.

We obviously need to ask, in a specific context, whether the humour expresses some defect in those purveying or appreciating the humour. We also need to consider the effects of telling a joke. That involves considering the expected harms of telling the joke, but it also requires us to consider the joke's expected benefits. The harms and benefits will be influenced by facts about the humourist, the audience and the butt of the joke, but not in the crude ways that are often assumed. However, these are not the only determinants of the quality and quantity of the harms and benefits. The location and the timing, for example, can also be relevant. Sometimes a joke is "too soon" after a tragedy. And some jokes may be acceptably told in one place but not in another. Consider here the difference between telling a profanity-laden, deeply disgusting joke in a bar and telling it in a church or a cemetery.

We need to weigh up the harms against the benefits. This does not mean that our determination must be a utilitarian one or, if it is a utilitarian one, that it must be

a simplistic utilitarian calculation. For example, if a joke will offend, we should ask whether the offence is deserved or not, and whether it is warranted or unwarranted. If it is deserved or unwarranted, it should be discounted in our weighing up of the harms and benefits. If it is undeserved or warranted it should weigh more heavily.

Considering and weighing all these factors will enable us to make more nuanced judgments about humour than are typically made. It is possible to think intelligently and carefully about the ethics of humour. This does not mean that in some cases there will not be scope for reasonable disagreement. For example, it will sometimes be unclear what the consequences of a joke will be, how important it is to tell it, or how warranted the resultant offence will be. In such uncertainties humour ethics is no different from the ethics of other practices.

CONCLUSION

Humour is often about serious subjects and the ethics of humour is, of course, no laughing matter. It deserves our serious consideration. It is possible, however, to take humour too seriously. In conclusion, consider one deeply ironic example.

Nando's, the South African chicken restaurant chain is well known for its witty, irreverent advertisements. In one of its advertisements, a blind old lady is led into a pole by her guide dog, who then snatches her take-out Nando's chicken after she lies concussed on the pavement. The advertisement was greeted with outrage by protesters who claimed that it made light of the blind. Some protesters thought that the advertisement "was more offensive to the reputation of guide dogs" (Feris 2000). The Advertising Standards Association of South Africa ruled that the advertisement was offensive to the blind (but not to the guide dogs) and that it had to be withdrawn (Sapa 2000).

The irony here is that the chickens consumed in Nando's outlets are, during their lifetimes, made to suffer in all the appalling ways in which chickens are reared and killed. Yet those objecting to the advertisement completely ignored this very serious moral problem and took the most important moral issues to be the reputation of guide dogs and the sensibilities of the blind[14]. That distortion is indicative of how unreliable popular views about the ethics of humour can be.

In a famous example of "anti-humour" we are asked: "Why did the chicken cross

14. Because they cannot see the advertisement those blind people who objected to it are offended by the bare knowledge of its existence.

the road?" This looks like the set-up for a joke, but when the "punchline" is delivered – "Because it wanted to get to the other side" – we realize that it is in fact not a joke at all[15]. Asking questions about Nando's advertisements may look like a case of humour ethics, but when the answers badly distort the relative weight of different moral considerations, it may in fact be a case of "humour anti-ethics". Taking humour ethics seriously involves not taking it more seriously than it should be taken.

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Only X%: The Problem of Sex Equality

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ABSTRACT

When Mill published The Subjection of Women in 1869 he wanted to replace the domination of one sex by the other laws based on 'a principle of perfect equality'. It is widely complained, however, that even advanced countries have still failed to achieve equality between the sexes. Power and wealth and influence are still overwhelmingly in the hands of men. But equalities of these kinds are not the ones required by the principle of equality that Mill had in mind; and, furthermore, a principle that demanded them would actually be incompatible with Mill's. The conclusion is not, however, that social policies dealing with men and women are all they should be. It is just that although the fundamental problems of feminism could be – and to a considerable extent still can be – expressed in terms of requirements for justice and equality, we have now reached a stage where concentrating on these ideas can distort the real problems, and may actually impede the kind of progress that is needed.

EQUALITY AND EQUIVOCATION

When John Stuart Mill was writing about the subjection of women in the early days of the Women's Movement, his aim was to show:

> *... that the principle which regulates the existing social relations between the two sexes—the legal subordination of one sex to the other—is wrong itself, and now one of the chief hindrances to human improvement; and that it ought to be replaced by*

> *a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other.* (Mill 1869, 1)[1]

The revolution in the relationship of the sexes[2] that has happened since that time, at least in advanced parts of the world, must be one of the most fundamental social changes there has ever been. And yet, it keeps being said, we are still falling far short of perfect equality between the sexes.

Everyone is familiar with an line of implied argument that goes more or less like this:

> *Justice demands sexual equality*
>
> *But only x% of CEOs/ senior academics/ government leaders.... are women; Women have only x% of male earnings/ leisure time...; Men do only x% of house-work/ child care....*
>
> *Therefore there is still unjust inequality between the sexes.*

I say 'implied' and 'more or less' because the argument is not usually spelt out. The work is typically done by the assertion of the some element of the second premise with an exclamation mark, as if the first premise and the conclusion were too obvious to need stating.

Politically, this seems to have been very powerful. Not many people, these days, are going to say in public that feminism has been wrong to seek equality of the sexes; and as long as women are unequal to men in such striking respects it looks as though there is obvious ground for feminist complaint. The results are familiar on all sides. Academics, for instance, find themselves perpetually assailed by emails from university administrators about the need to address 'gender imbalance' in subjects that are male-dominated, or about fears that crediting characteristics like confidence and style in examinations or appointment procedures may unfairly benefit male candidates. More widely, policies may be demanded to make sure that there are as many

1. The account given here is a rather free interpretation of Mill. He directly or indirectly makes all the points referred to, but they are scattered around the text and not presented in this form or with this emphasis. The page references are generally to places where the relevant points are mentioned, but there are usually many other places where similar remarks occur.

2. I follow Mill in using the term 'sex', rather than the currently familiar 'gender', throughout.

women as men involved in sport, or occupying important positions in public administration. The anxiety is everywhere among people who are supposed to be committed to sexual justice, because they seem to keep falling short of their commitments to equality.

However, the political usefulness of a form of argument is often inversely proportional to its moral integrity, and, as they stand, implied arguments of this kind are spurious. Equality, *tout court*, is not a possible requirement of justice at all, because nothing can be simply equal or unequal to anything else. Things can be equal or unequal only in particular *respects*, and unless the kind of equality required in the first premise—the moral principle of equality—is the same as the kind fallen short of in the second, such arguments are fallacies of equivocation. Sex equality sounds a reasonable, even self-evident, aspect of justice; but if the details are left unclear the ideal can seem to work as a blank cheque, apparently underwriting objections to any kind of sex inequality at all. Pursuers of equality need to make sure that the kinds that keep eluding them really are the ones they set out to catch. It may be intuitively clear that some kind of sex equality is a fundamental requirement of justice, but what kind of that is, and what it does and does not entail, is not in the least clear.

What I shall try to show is that the 'ideal of perfect equality' advocated by Mill is of a fundamental kind that nearly everyone accepts, at least by implication, and that this kind must be regarded as an essential aspect of sexual justice. Then, in the light of this, I shall consider claims of the 'only x%' kind, and argue that they cannot in general be treated as unjust by the standards of Mill's principle, because the two inequalities are of quite different kinds. This means that if the inequalities of outcome identified by 'only x%' complaints are to be regarded as unjust, a different kind of equality principle is needed to support them. However, I also argue that any attempt to apply this other kind of principle to the case of men and women would actually lead to conflict with Mill's principle. The rhetoric of the 'only x%' complaints is, in general, seriously misleading.

The conclusion of all this, however, is not that conservative opponents of radical change in the relations of the sexes are right to resist such change. It is rather that the some of the most fundamental problems we now face need addressing in a quite different kind of way, which can often be inappropriately obstructed by the language of equality and justice.

MILL'S IDEAL: IMPARTIALITY

The particular concern of Mill and his fellow campaigners for change in the situation of women was the laws and institutions that differentiated the sexes at the time, and which, as Mill said, brought about the subordination of one sex to the other. He divided his concerns into two distinct, but related, areas. First there were all the laws, as well as other institutions, that systematically kept women out of the territory regarded as men's: professions, higher education and political participation. These limitations on women's activities had the additional effect of giving most of them no real alternative to marriage; and the laws governing marriage were Mill's other target. These placed women, their property, and their children under the control of their husbands, with virtually no chance of escape—in a situation that Mill said amounted, legally, to slavery (Mill 1869, 53-58). What he and other campaigners wanted was access for women on the same terms as men to all the areas from which they were currently excluded, and equality in the marriage contract.

What exactly was the 'principle of perfect equality' that, by implication, underpinned these demands? It was not directly stated in the form of a principle, but it can be inferred from the kinds of argument Mill used against his opponents.

To the most extreme of these opponents, the deep-dyed conservatives, he had little to say. Some of them used explicitly religious arguments to justify women's position, and these Mill simply dismissed out of hand, saying that appeals to religion were resorted to only when something was 'too bad to admit of any other defence'(Mill 1869, 84). Others claimed that the present arrangements must obviously be best since they had been accepted for thousands of years, and these arguments he swept aside by pointing out that we were not in a position to make any such claim, since we had never tried anything else (Mill 1869, 7-8, 37). The opponents to whom he mainly addressed himself were ones who, like himself, were broadly liberal in their approach to politics, and wanted significant social change in other areas, but who nevertheless remained convinced that there was nothing radically wrong with the existing legal relationship between the sexes. And his way of dealing with these was not to offer new moral principles or even new empirical evidence, but to argue that liberals' arguments against the emancipation of women failed *by their own standards.* What they professed in other political contexts, and what they already knew about matters of fact, should have been enough to persuade them of his case for legal equality between men and women.

For instance, it was commonly claimed at the time that women were kept out of men's occupations because they were not capable of them. But in the first place—as everyone knew—at least some women had already shown clear ability to do all the things women were not supposed to be able to do, and to do them well (Mill 1869, 93). Second, there were so many obstacles placed in women's path, as again everyone knew since this was just the situation they were defending, that mere failure to match men's achievements was no evidence for inherent lack of ability (Mill 1869, 98): it was reasonable to presume that women were capable of much more than had ever appeared. And third, there was the logical clincher. Even if there really had been evidence for women's lack of ability that would still not have justified separate rules to exclude them from men's territory, since the rules and competitive structures already in place to exclude substandard men would automatically have the effect of excluding substandard women. 'What women by nature cannot do', as Mill said, 'it is quite superfluous to forbid them from doing. What they can do, but not so well as the men who are their competitors, the competition suffices to exclude them from'(Mill 1869, 48).

He also refuted by similar arguments the standard justifications of women's legal subordination in marriage. For instance, it was widely said that the legal position of women reflected their natural role, and was what women themselves wanted. But some women, at least, were already known to be protesting about their situation (Mill 1869, 24), so this was certainly not a universal truth about the nature of women. And again, it was reasonable to presume that there would be far more of these protesters if women had not been brought up from infancy to conform to the feminine ideal (Mill 1869, 25); in fact, it was reasonable to suspect that there were already far more women who would have liked to protest than actually did, but dared not because of their total dependence on their husbands (Mill 1869, 27-28, 145). And finally, yet again, if men really thought that women wanted to be in their subordinate situation, what was the purpose of all the laws and institutions designed to keep them there? (Mill 1869, 49-50). There is no more need for laws to force people into doing what they want to do than to prevent them from doing what they cannot do.

Challenges of these kinds to prevailing arguments against the emancipation of women, then, did not depend on the assertion of different, more liberal, political principles from those of his opponents, or even on the presentation of new evidence, but simply on the fact that the present position of women could not be justified in terms of the principles accepted by most of the opponents themselves—and, indeed,

was incompatible with them. The laws that kept women in their traditional female sphere were completely at odds with the 'modern' idea that people should not be chained to the situation they were born to, and should be free to make their own way in life (Mill 1869, 29-32), and the legal subordination of women to men was ('now that negro slavery has been abolished') the only form of slavery permitted by the law (Mill 1869, 147). The legal and conventional position of women was not derived from prevailing political ideals, but actually *overrode* them (Mill 1869, 36).

If arguments like this showed that the situation of women was unjust, what standard of justice was, by implication, being invoked? The essence of the matter seems to be this. The arguments showed that the legal and conventional situation of women was *arbitrary*, in the specific sense of not being justifiable in terms of any principles normally accepted by the advocates of that disadvantage. Against the prevailing nineteenth century background, the disadvantaging of women, and corresponding advantaging of men, amounted to *an end in itself*. A principle ruling out such arbitrary advantages and disadvantages could therefore support the campaign for sex equality in its traditional form.

The implied principle in question is difficult to pin down, but for now it will be enough to indicate the kind of thing it is. It is on the lines of Bentham's dictum 'Everyone to count for one, nobody for more than one': the requirement that in the planning of social arrangements, everyone's interests should be regarded as equally important. It is a requirement that philosophers have variously called ground-level impartiality, or equal consideration of interests, or positional indifference. It is not a substantive principle in its own right, in the sense of specifying who should have what, or what should and should not be done, or what institutions a society should have. It is merely a constraint, specifying that nobody should be subjected to a disadvantage that cannot be justified in terms of positive principles accepted by the people advocating that disadvantage. In itself, it specifies only that one group shall not be disadvantaged *simply* for the benefit of another, and that a necessary (though not sufficient) condition of acceptable disadvantage is an impartial principle that permits it[3].

This means that the practical effects of implementing this minimal principle derive from whatever positive principles and values are already in the background. In the nineteenth-century context, it would justify the political aims of contemporary feminists for the limited range of rights currently possessed by men. Against a

3. For instance, the liberal principle that jobs should go to the people best qualified to do them makes non-arbitrary the disadvantage of people who are not very good at anything.

background of different positive principles, it would have had different implications[4]. This is something Mill makes clear when discussing women and the vote. There was at the time considerable debate about how far into the working classes it was safe to extend the franchise, and Mill was involved in this debate, but his opinions on this subject were irrelevant to his arguments about the enfranchisement of women. 'Under whatever conditions, and within whatever limits, men are admitted to the suffrage, there is not a shadow of justification for not admitting women under the same.' (Mill 1869, 96-97)

A useful image for clarifying this point is of society as a game or race of some kind. If you are complaining about the rules and conventions of some race, one basis for your complaint may be that the whole thing is wrongly conceived, and that it should be based on different principles. If the race in question is of a winner-take-all variety, for instance, you may recommend instead a caucus race in which all win and all have prizes, or a fun run that has no winners, or a handicap to give the poorer competitors a sporting chance, or a competition that accomplishes something useful to the community like the ploughing of fields or the harvesting of apples. If you advocate an altogether different kind of race from the kind your opponents approve, that amounts to a criticism of the principles and values they think should determine its structure.

However, you might also make a quite different kind of complaint about the current race. Quite irrespective of whether you disapproved of the principles underpinning its fundamental rules and conventions, you might complain that some of the competitors were being subjected to disadvantages that were arbitrary, in the specific sense of not being justifiable in terms of the general principles, whatever those were. Whether or not you prefer caucus races to apple-harvesting races, you can still object to women's having to run either with balls and chains attached to their ankles, or to other players' being allowed to trip them up with impunity, if the underpinning principles can give no justification for this[5]. Such disadvantaging not only gives arbitrary benefits to men (allowing them to get more of the prizes, or at least to enjoy the race more); it is also unjustifiable in terms of whatever principles underlie the race as

4. If this kind of female inequality is removed against a background of feudal aristocracy, for instance, it (probably) entails that the eldest child of the ruler, of either sex, succeeds to the throne, while the wife of the toiling peasant has the same rights (virtually none) as her husband.

5. The qualification is important. Impediments of some sort could well be an integral part of the setup of the race—as, for instance, in the case of a handicap race. The balls and chains referred to here are to be understood, throughout, as arbitrary.

a whole. In the apple-harvesting kind of race, for instance, the women not only win fewer prizes, but also gather fewer apples for the good of all than they would otherwise have done. In other words, if a group is arbitrarily disadvantaged in this sense it has (schematically) *an unfairly small share of an unfairly diminished whole.* And you can make this kind of complaint quite irrespective of whether you accept the background principles on which the race is based. Its foundation is a quite different sort of principle, neither in competition with the positive background principles nor reducible to them.

This, then, seems to be the kind of idea that was in effect being appealed to by the feminists of the nineteenth century, who were seeking equality for women within the political status quo. Even if they would have preferred a different kind of race altogether, they still wanted to remove the balls and chains arbitrarily attached to the ankles of women. It was in virtue of this that they were feminists, rather than, or as well as, political campaigners of a more general kind.

Since this principle of ground-level impartiality or equal consideration of interests is negative and minimal, with no positive implications of its own, it specifies nothing about the particular kinds of value a society should have or how it should be organized. But it is worth noting that this minimality has a corresponding advantage, which is that the principle is now effectively beyond controversy. People may not go around expressing an explicit commitment to ground-level impartiality and equal consideration of interests, but their implicit acceptance of it is shown by the logical contortions and empirical fantasies they will adopt rather than admit to contravening it. The nineteenth-century liberals who opposed women's emancipation could simply have claimed that it was appropriate for men to be given arbitrary privileges, but they did not. Instead they entangled themselves in the absurdities of trying to make out that women needed to be forbidden to do what they were alleged to be incapable of doing, and forced into what they would have chosen of their own accord. The principle of equal consideration of interests, somehow understood, is in practice hardly controversial at all, and may reasonably be regarded as the threshold any rule or standard must pass to count as moral in kind. It must obviously be an essential basis of any campaign for justice for women.

The idea that women have been treated wrongly in this way is caught by the familiar idea of *discrimination*, with its implication that women have been, and are, excluded from all kinds of positions, not *because* they are unsuited to them, but *in spite of* the fact that they may be able to do them perfectly well. The word needs to be

treated with care, because in practice its meaning is often stretched, so that its connotations of injustice can be transferred to quite different kinds of complaint. When I use it here, it will have only this limited meaning.

IMPARTIALITY AND EQUAL OUTOMES

Now, in the light of this, consider again the rhetorical 'only x%' complaints. The first question to ask is whether they show that women are unjustly treated by the standards of the principle of impartiality or equal consideration of interests. In other words, if we fill in the implied argument mentioned earlier, and put this in as the first premise, can we reach the injustice conclusion?

It may be helpful to take a particular illustration rather than dealing in abstractions, so consider the complaint that only x% of senior managers are women, and consider the implied argument as a whole. Spelt out, it seems to look more or less like this:

Justice demands impartiality/non-discrimination

But only x% of senior managers are women

So women are still unjustly treated/discriminated against

The underlying idea is that there are in place criteria for selecting senior managers, and that the shortfall of women shows either that there is discrimination at the point of selection, or, if women really are less suitable at that point, that they must have been discriminated against earlier, in their education[6]. The difference in numbers of women and men is *evidence* for discriminatory treatment somewhere along the line.

Now, obviously, if two groups emerge with unequal outcomes of this kind there must be *some* kind of inequality of input between them, but from the outcome alone it is impossible to tell where those inequalities are. They may stem from discriminatory treatment, but they may also depend on differences intrinsic to the groups

6. Note that if the complaint is about the criteria used for appointing managers it comes into the category of complaints about the rules of the race, rather than about discriminatory application of them.

themselves, or in their situations. In order to attribute an inequality of outcome to arbitrary discrimination, therefore, you need to eliminate the other possibilities. But this presents obvious difficulties.

In the first place—almost too obvious to mention—most women's circumstances have always been different from men's, quite irrespective of any discrimination, just in virtue of their biology. If Mill had miraculously had his way in 1869, and all sex inequalities of treatment had instantly ended, he would certainly not have expected this to result in equality of outcome between the sexes in such matters as status and achievement. Once a woman married—as most presumably would have done, even without the pressures Mill was castigating—there would be no further choice for most of them about pregnancy and breast-feeding, and that would inevitably limit time and opportunity for other things. For most of history there was nothing at all arbitrary about a sexual division of labour (as opposed to sexual inequality of status and rights), and in Mill's time this was still the case. Even though many women with children did have to go out to work, their extra ties to the children necessarily put them at a disadvantage to men from the point of view of competing in the world beyond the home.

Of course now, with contraception, bottle feeding and labour-saving devices of all kinds, these restrictions are far fewer than they were. But still in the nature of things women, on average, are necessarily more tied down by children than are men. Whatever the future may hold in the way of male pregnancy or in vitro gestation, this difference between the situations of men and women is something that for most women, in most parts of the world and for the foreseeable future, is bound to continue. Women and men are, in this sense, often naturally in different circumstances, which means that, for those women, difference of outcome certainly cannot be confidently attributed to discrimination.

It will be said by many, of course, that if women are held back by children that is in itself discrimination: society should be organized so that men take their fair share, and that society as a whole should be responsible for making sure women with children can compete with men elsewhere on equal terms. I shall return to such issues later. For the moment, however, all that needs to be said is that even if so, this is not an issue that comes into the arbitrary discrimination category: if it is called discrimination, this is an instance of stretching the term to cover different kinds of complaint. If a woman who has small children cannot do as well in senior management positions as competitors (male or female) who have no such responsibilities, that is no more

evidence for discrimination against her than if people with hobbies that absorb their time and interest do less well in their professions than do others without those interests. If women with small children should have special concessions in other areas, that is once more a question about the underlying rules of the race, rather than about arbitrary treatment within them.

For now, anyway, for the sake of pursuing this particular question—that of whether unequal outcomes of the kind we are considering can provide evidence of arbitrary discrimination—consider only women who have no children. If even they are disproportionately represented among senior managers, can that be regarded as evidence of discrimination?

This brings us to the most contentious issue of all in this area: whether there are natural differences between the sexes that might account for differences of outcome, quite irrespective of any discrimination or difference of circumstance. Mill claimed that we could not yet know about the extent of natural similarities and differences between the sexes, because their systematically different treatment had prevented any controlled experiments (Mill 1869, 38-39). We knew that there had been differential treatment, so we could not know how many, if any, of the observed differences between men and women could be attributed to differences in nature. Now, however, there are many circles in which it seems to be treated as beyond question that there are no fundamental differences in character and ability between the sexes, and that all differences are 'socially constructed'.[7] This means that the question of whether 'only x%' claims can be regarded as evidence of discrimination comes down to the question of whether there is any justification for replacing Mill's agnosticism with this claim about the sexes' essential natural similarity in all but the most obvious respects.

It is important to stress that because the question being asked here is about *evidence* it must be treated as purely scientific. It is not about political policy, such as whether affirmative action policies of some kind are justified, or whether the benefit of any doubt should always be given to women. The positive evidence for discrimina-

7. The term "gender" was originally commandeered to refer to such supposedly nonbiological differences, and it is a sign of how taken for granted the social construction view has become to feminism that the substitution of "gender" for "sex" rapidly became compulsory among the politically enlightened. Since I regard the social construction view as mistaken, and seriously misleading in the pursuit of justice for women, I still resist the use of 'gender' for 'sex' – though I am afraid the battle to preserve its use has probably already been lost. It has now spread to the population at large; I have even noticed it, as a flagrant anachronism, in television dramatizations of Jane Austen.

tion given by any 'only x%' complaint can only be as strong as any positive evidence that the sexes are intrinsically alike in all relevant respects.

It is sometimes said that natural sameness in unknown respects is the reasonable presumption to make unless there is positive evidence to the contrary. But, as a matter of science, this is certainly not true. If two things seem the same you may well presume they are the same in all respects until your science advances far enough to show subtle differences; science had to go a long way before it could identify the difference between ordinary and ionized water, for instance. But if two kinds of thing are different in systematic and striking ways, as are men and women, no scientist would decide that it was reasonable to presume they must be alike, on average, in unknown ways unless there was positive evidence to the contrary. In creatures as complex as higher animals, where the mental, emotional and physical are inextricably entwined, it cannot possibly be taken for granted that physical differences do not influence the other characteristics. Scientific rationality involves exploring the obvious differences, to find out how much they are and are not connected with less obvious differences. A great deal of *positive* evidence would be needed to reach the conclusion that there were no differences between men and women on average in subtle areas of character and ability and emotions.

Since sameness in unknown respects is not a reasonable presumption to make in the case of organisms that are conspicuously different in known respects, the question is what positive evidence have we have now, when science has moved far beyond the days of Mill. It does seem that Mill was right in his speculation that the average woman was not at all inferior to the average man in matters of intellect, general intelligence, inventiveness and the like, though there are interesting differences of detail and variation. But in many areas—emotions, interests and many others—there is strong and increasing evidence of tendencies to many kinds of difference. Ordinary experiment and observation is being increasingly reinforced by developments in other parts of science: understanding of the effects of hormones, for instance, and the great advances that are coming from the direction of evolutionary theory. It is no part of this paper to enter into the details of scientific controversies, but in view of both these considerations—presumptions it is and is not reasonable to make in the absence of positive evidence, and such positive evidence as there is—it is hard to see how anything but determined ideology could form the basis of any insistence that average differences of outcome between the sexes must be attributed to social construction and other kinds of discrimination.

This argument is not, of course, intended to suggest that continuing discrimination does not exist. It certainly does, as we know perfectly well on other grounds. For instance, there are experiments where people are asked to assess essays or articles, and it turns out that the assessment is strongly influenced by whether the supposed author is given a male or female name. And in some particular contexts we may even be able to infer discrimination from 'only x%' claims. If women and men have comparable success in universities that make special efforts to treat the sexes equally, for instance, and others still have great inequalities of outcome between them, that gives reasonable grounds for suspicion that there are inequalities of treatment in the second group. Arguments along these lines are complicated and need to be made for each case individually, but there are certainly cases in which continuing discrimination can be demonstrated.

That, however, is not the issue here. There is no problem about investigations to determine the extent of discriminatory treatment between the sexes: it positively needs to be done if we are to achieve ground-level impartiality of treatment. Here the question is only of whether inequality of outcome between the sexes can provide the relevant *evidence*, and in general it cannot. Without considerable further evidence in particular cases, 'only x%' claims cannot be regarded as evidence of infringment of Mill's principle of equality. There is a slip in the implied argument. The kind of equality demanded in the first premise is not the kind shown to be lacking by the 'only x%' complaint.

INEQUALITY AS INTRINSICALLY UNJUST

But, it may be said, if men and women do differ by nature in many ways, and if the result of treating them with Millian impartiality is that men go on having most of the power and influence, that means the background itself is wrong. Society should be arranged so that the sexes are equally successful, and until that is done women will still be unjustly treated.

If this move is made, it is to a quite different position. It is no longer a ball-and-chain complaint, but a complaint about the principles on whose basis the race has been designed in the first place. The suggestion now is that even if arbitrary discrimination has been eliminated, there is still something wrong about a race that has more male than female winners. Justice demands that we change the underpinning values,

until the results are equal between the sexes. So the question now is whether 'only x%' complaints can be justified by arguments along these lines.

The challenge for anyone who thinks they can be justified in this kind of way, is, once again, to fill in the details of the implied argument. It would need to begin with some kind of positive equality principle: a principle about the running of society that made it important not just to treat people impartially, but to guarantee some degree of equality between them in their actual possession of some good.

As soon as you start trying to do this in any detail, the complexities become apparent. For instance, you need to decide *which* goods you think should be equalized. There is a long-running dispute, for instance, between people who think we should equalize opportunities in some way (perhaps by giving people equal education and letting the competition rip thereafter), and people who want to equalize outcomes (perhaps by making sure everyone has the same pay). Examples like this show that equalizing some things may be incompatible with equalizing others. Then you need to decide such matters as how important *equality* considerations are in comparison with other things that may be regarded as important, such as increasing the overall quantity of whatever is good. There is so much controversy about such matters—even among people who agree that equality considerations matter at all—that even if you could find a principle that satisfied you, not many other people could be expected to agree with it. So even if your principle were of a form that could support your 'only x%' complaint, you could not expect other people to share your view that this was a matter for indignation. While everyone seems to accept that there should be no arbitrary balls and chains, there is no agreement at all about the fundamental principles that should underlie the race as a whole.

But as well as that problem, there is another that goes deeper than mere scope for controversy. Consider again a complaint of the 'only x%.....' variety, with its implication that justice requires sex equality in that particular respect. What positive ideal of justice would, if accepted, support this conclusion? If you think that society should be arranged so that men and women on average have equal pay, for instance, what impartial principle might do the job of justifying this?

The most obvious possibility lies in some kind of general egalitarianism. If everybody should be equal in the respect at issue (in this case pay), this would in itself have the implication that men and women should be equal. But anyone who held a principle of that kind would have no basis for special complaints about inequality of pay between women and men in particular. All inequalities of the pay would be

equally open to objection. This means that a special concern for the equalizing of women and men makes sense only against a background of general ideals that allow for *inequality* in that respect.

Perhaps it might be said that all *groups* should be equal; but that would not improve matters. If *all* groups should be equal, the logical implication is once again that everyone should be equal. And if, on the other hand, it is only particular groups that should be equal, this runs straight back to the original difficulty of finding a principle that demands the equalizing of some groups but not others, while still regarding everyone's interests as equally important

This is a serious difficulty. If equality of outcome between men and women is treated as being of particular intrinsic importance *without* there being an adequate justification, any such equalizing is in itself, paradoxically, open to exactly the same objection as the original unequal treatment of women. It would itself involve an infringement of ground-level impartiality.

You can see this by imagining that you have worked out the general criteria by which, counting all individuals' interests equally, you can decide whether a society is getting better or worse. In particular, you have decided the relative importance of making people's possession of some good more equal and increasing the total amount of that good. Suppose also that you are an extremely powerful dictator and can do anything you like, and that after a series of social experiments you have identified the social institutions that produce the best outcome by those standards, whatever they are. All other known arrangements make things worse. If your egalitarianism is of such a strong variety that such a situation must involve no inequality between individuals, the problem of sex inequality does not arise. If on the other hand there is general inequality, it is a priori likely, by the arguments of the previous section, that one sex will on the whole tend to be better off in the respects you are concerned with than the other. But if this happens, and you then equalize the sexes (or just increase the equality between them), you will, ex hypothesi, make things worse overall *by your own criteria*.[8] In that case, the individual advantage and disadvantage brought about by equalizing the sexes will be *in spite of*, not *because of,* the general principles in the background; and this is just what ground-level inequality of consideration consists of.

8. Except in the limiting cases where two possible states come out equal, and one of them contains more sex equality than the other. In that case the principle of impartiality would entail that the two would be of equal value irrespective of sex equality

Another way of expressing all this is that if the best obtainable outcome, by whatever general criteria you please, results in overall inequality, the principle of equal consideration of interests specifies that it does not matter who comes where in the spread. It is *intrinsically* no worse that one group should be towards the bottom of the heap than that there should be a heap at all.

Treating any kind of positive sex equality as a requirement of justice, therefore, must potentially involve overriding whatever general principles are in the background, and in doing so discriminating against the members of whichever sex would otherwise have been better off. Positive principles of sex equality are actually in conflict with Mill's impartiality principle. If the first matters, the second is unacceptable. Equalizing the sexes in the possession of some good is not a legitimate aim.

This shows why it is so important to distinguish between the need for equality in the sense of impartiality from positive equality principles that might be recommended as the basis of rules of the race. They are totally different in kind—neither in conflict nor reducible to each other —and only the first kind of equality seems relevant to relationship of the sexes.

My suspicion is that what underlies the prevalence and power of the 'only x%' rhetoric may be a similar conflation of these quite different kinds of equality. Negative equality ideals have immense moral power, and also are directly relevant to the traditional aim of ending discrimination against women. Their problem is that they have, on their own, no direct practical implications. Positive equality ideals, on the other hand, while highly controversial, do support positive practical requirements that can be applied directly to states of affairs. If the two are conflated, the power and sex-applicability of the first may merge seamlessly with the specificity of the second, and give the appearance of providing a justification of inequality complaints. But they are distinct, and neither can justify the 'only x%' complaint.

That must sound outrageous to many feminists. It sounds like an argument that plays directly into the hands of men who say that we now have impartiality in the treatment of men and women, and if women are still worse off that is because they are naturally inferior. Any further equalizing would amount to discrimination against men.

However, the matter does not end here. The problems about justifying policies of positive equalizing between the sexes do not imply that change cannot be justified at all. The implication is only that large tracts of the problems about managing

a world that contains men and women need to be formulated in different terms, as I shall try to show.

THE WIDER PROBLEM

This final section hints at the vast reach of the problems we are now confronting. What I want to do is sketch (only sketch) a wider view of problems about the relationship of the sexes, and suggest the need to recognize issues that it is difficult to characterize in terms of justice and equality.

First, as a way into this, return to the fact that arbitrary discrimination against women, which is wrong by just about everyone's standards, is still going on. Such discrimination is harder to demonstrate now than it used to be, and it cannot be directly inferred from inequalities of outcome. But, as mentioned already, there is positive evidence that it occurs, and it is reasonable to presume that it is far more widespread than can be demonstrated with any certainty. If so, anyone who agrees that such discrimination is unjust should accept that measures should be taken to try to prevent it.

There are many ideas about what these might be. Some, for instance, take the form of trying to prevent discrimination directly, by instituting blind refereeing of articles, or insisting that people making appointments begin by listing the qualities they are looking for, and then writing a report assessing each candidate strictly in terms of how they measure up to the requirements and justifying the eventual selection in those terms. But presumably we should also be trying to tackle the fundamental causes of traditional arbitrary discrimination, and if we are to attempt that we need to understand those causes. Some of them, no doubt, lie in the wishes of men to keep women in their subordinate position. But there is evidence that discrimination is also perpetrated by women (as anti-feminists never fail to point out) so it cannot all be attributed to a peculiarly male form of original sin. It is also clear that much discrimination—by men as well as women—has no malign motivation at all, and is entirely unconscious and unintentional. It seems to be rooted in deep, traditional beliefs about the natures of the sexes, which systematically distort judgments about individuals.

If this is so, how might we try to eliminate such discrimination? We need to try to change the way people think about women. If people underestimate women's abilities because they are not used to seeing them in particular roles, one way to dislodge those preconceptions might be to flood the relevant areas with women, until the

sight of them was so familiar that nobody retained any of the former presumptions. Some of this might be achieved by encouraging more applications from women and making sure they were not discriminated against if they did apply, but if that did not produce enough women to do the job of dislodging prejudice, perhaps more radical measures might be considered. Perhaps the standards of admission might be lowered for women, to produce greater equality of representation between the sexes.

The trouble is, of course, that policies of this kind look like straightforward cases of reverse discrimination. If impartial selection policies result in unequal numbers of men and women selected, and we try to impose greater equality, we are doing exactly what was ruled out by all the earlier arguments. We are arbitrarily benefiting the women who are admitted too easily to these desirable positions, arbitrarily disadvantaging the men who should by rights have been appointed, and getting the job less well done. If the principles of equality that form the basis of feminism are flouted in such kinds of affirmative action, surely morally committed feminists should be opposed to them.

But in fact this description of such a situation is mistaken. If a policy of getting men and women more equally represented in some situation is given a justification of this form there is no discrimination, because femaleness is a characteristic directly relevant to the job that now needs to be done. It has been decided that the people appointed should both be able to do the original job—senior-managing, or whatever—*and* contribute to the dislodging of discriminatory attitudes to women. Schematically, the purpose of the job has changed: part of the job description is now contributing to the dislodging of prejudices about women. Changing the purpose of a job in various ways when circumstances demand is perfectly normal—as when a school decides that it needs its new maths teachers to be able to teach physics as well. The change affects which candidates are chosen, but if there is a genuine need for physics there is no discrimination against the maths-only teachers who would otherwise have been appointed. The purpose of the affirmative action described here is to achieve the end of dislodging prejudice, not to benefit the selected women who are advantaged by it. That advantage is merely a by-product of its real purpose, which is their *instrumental* value in achieving the desired outcome.

Of course someone who really wanted greater female equality as an end in itself might offer instrumental arguments of this sort as an excuse for them, but a genuinely instrumental argument for greater sex equality works quite differently in practice from one that demands equality as a requirement of justice. All instrumental justi-

fications of policies are endlessly sensitive to changing circumstances and changing evidence, and may be in many ways tentative. In the case of a policy like the one described above, people who thought of implementing it would need to consider whether the aim of dislodging prejudice was sufficient to justify any reduction in the standards to which the original job was being done, and that alone is a complicated matter. It involves assessing the value of both aims, and the probability of achieving adequate success in them. The results also need perpetual monitoring, so that if the policy is not producing the desired outcome, or if its cost becomes too high, it can be adjusted or abandoned. In the case of affirmative action of this kind, for instance, it would be essential to keep the lowered standards for women high enough to make sure that the job was still done well, since the effect of appointing bad female senior managers would just be to entrench the old preconceptions. Such tentativeness and continuing assessment is quite unlike the situation that would result if the appointment of more women were seen in itself as a direct requirement of justice, rather than as a means to some further end.

In this particular case the purpose of the policy is to dislodge prejudice, and therefore part of its justification is the original feminist aim of eliminating discrimination against women. But it also introduces a more general point. A policy of this kind is neither required by justice nor forbidden by it. It is not obviously necessary for the purpose of achieving justice for women, because it might not work, or other policies might be better, or its costs might be too high; it is not obviously unjust to men, because the selection policies it involved have a plausible justification. It comes into the category of innumerable other things we try with a view to achieving other aims: plausible and worth trying, but to be regarded as experiments in need of constant monitoring.

What I want to suggest, briefly, is that far more of our questions about the relationship of the sexes need to be seen in these terms. Relatively few potential policies can be seen as requirements of, or forbidden by, clear principles of justice.

What we can see is that we are in uncharted territory, because the position of women in large parts of the world has completely changed in the last half century or so. Political change has taken them out of their legal subordination to men, and technological change has to a large extent freed them from their biology: they can choose not to have children, or to limit their number. On the other hand, they have emerged into a public world whose structures developed without their say, and without any direct consideration of their interests. It is overwhelmingly likely that there must be

better ways of arranging the fundamentals, by any impartial standards, but we have little idea as yet of what these may be.

Consider again the thought experiment mentioned earlier of working out your ideal principles of justice, and experimenting until you had found the social arrangements that brought about the best possible balance of equality and quantity in the goods you valued. If either sex emerged better off than the other, and you imposed sex equality on that arrangement, you would be making everything worse by your own standards, and in doing so discriminating against the sex that would otherwise have been better off. That remains true as a matter of logic, but how does the point connect with the practical problems that confront us? Apart from the fact that most people never get anywhere near formulating a coherent set of standards, let alone agreeing with others if they do, it would in practice be absolutely impossible to tell when the best possible way to realize them had been reached. Whatever you achieved, there would always seem to be ways in which you might make things better. Even if we ever agreed about ideal standards by which to assess and compare societies, we would still have no practical prescription for producing the best possible outcome. All we can do is keep experimenting, and making adjustments in the light of the results.

In the beginning, the political aim of feminists whose aim was negative equality was the breaking down of formal barriers. Their claim was that there was no justification for laws keeping women out of higher education, or politics, or high office, or for making them legally subject to their husbands. But although the first aims were clear, the later ones have not been. We know that the traditional arrangements were wrong; we can show, for instance, that traditional marriage arrangements cannot possibly be justified in general terms since they *simply* gave power to men, and in doing so infringe the principle of negative equality. But that does not even begin to suggest what positive arrangements should be put in their place. We know that the exclusion of women from the professions and politics was unjustified, and we have reason to think that radical rearrangement will be needed if women are to do what they are capable of doing; but again it is not in the least obvious what arrangements would be best.

There are indefinitely many possibilities. Trying to make the sexes and their activities as alike as possible—sometimes called androgyny—can be recognized as a possible direction to move in, and worth thinking about; but there is no reason to presume, just because there was for a long time an unjustified determination to keep women off men's traditional territory, that all tendencies to sex differentiation must

be a bad thing. Ideas of androgyny are often themselves a direct reaction against the past, rather than a radical rethinking. And this is true in general. Much of what feminism has achieved so far has involved only a direct reaction to the previous state of things: anti-discrimination laws, women having children on their own, easy divorce, a sexual free-for-all, child-minding while women work in traditional environments—rather than radical, structural change. The need for rethinking is, furthermore, being increased all the time by technology, which affects both family structures and connections, and the nature of work.

My own view is that many of the issues currently discussed in terms of justice and equality could better be seen in this wider context: questions about whether and under what circumstances there might be single-sex institutions of various kinds; whether the institution of marriage should remain, and if so what rules should surround it; what responsibility there should be for children; whether we should try to make men and women more similar in their activities, or accept some deep differences, and so on. These issues look quite different when they are removed from discussion in terms of justice and equality, and seen as matters that need to be experimented with.

Consider, for instance, ideas about maternity leave and free child care. These demands cannot be justified on obvious grounds of justice to women: there is no clear principle of justice according to which, if you make a decision to use your childbearing abilities (abilities that men do not have), employers and the state should make arrangements to make sure you lose nothing else. Nor can such arrangements be obviously rejected on grounds of justice to men—though the question of whether men in general should support children in whose production they have no say is a legitimate one. But it is perfectly reasonable to recognize that what women do in the area of childbearing is relevant to just about every other part of social life, and we need to try to find out what effect different arrangements have on other parts of society, not just on women. If subsidized child care turns out to have widespread benefits it may be justified in those terms, even if it is not a direct requirement of justice to women. And it is not legitimate to block those possibilities out of hand on the grounds that the incidental benefits to women are unfair to men.

It is virtually impossible to do anything systematic about implementing impartiality in the assessment of radically new structures as they are proposed, because we have hardly anything to go on. We can identify failures of impartiality when arguments justifying the position of women fail in their proponents' own terms; but

when radical change is proposed, and we are trying to guess the results of different kinds of organization and think through fundamental principles and values, it is difficult to see how a positive test for impartiality could possibly work.

However, one thing is clear. At least part of the reason for the radical unsuitability of many traditional social, economic and political—and even domestic—arrangements is that women had little or no say in their setting up. It seems plausible, therefore, that the most reliable way to make sure that men's and women's interests are equally represented in all future social experimenting is to have the sexes themselves equally represented in all organizations that make major decisions about laws and institutions.

We still tend to accept the liberal ideal of choosing the person best able to do whatever job needs to be done (whatever that means), and it is commonly said as an article of faith that sex is irrelevant and should not come into the matter. This is the usual objection to quota proposals. But there is another point of Mill's, about representative government in general, that should not be overlooked. Although, from the point of view of competence and efficiency, we want people with the greatest expertise to do whatever needs to be done, decisions cannot be left to the experts alone because nobody can be trusted to represent anyone else's interests. There are two elements involved in government: competence, and simple representation of interests. Given men's long record of rigging the arrangements for their own benefit, women need to represent their own interests in full force. (As men will need to represent theirs, if—as may happen—the power pendulum swings the other way.) If we do this, the purpose will not be to give equal political power to men and women because they are intrinsically entitled to equality in powerful positions, but as an instrumentally valuable means to equal consideration of interests.

Such a possibility is at least worth considering; and as long as there is no losing sight of the kinds of argument needed to assess it, there will be no harm in doing so.

Perhaps this is a suitable proposal on which, tentatively and provisionally, to end.

CONCLUSION

The underlying thesis of this article is the importance of distinguishing two radically different kinds of principles about equality, and the implications for assessing 'only x%' complaints.

The kind of principle that I have argued relates to women (and, incidentally, to many other disadvantaged groups—but that is a very long story) is the minimal principle of equal consideration of interests, which has itself no substantial implications. The practical implications follow from whatever general principles are in the background. What this principle loses in practical specificity, however, it gains in power: this is a principle that, by implication, everyone accepts, and whose occurrence can often be decisively demonstrated—even if not by such usefully obvious tests as equality of outcome. The other is the broad political question of the extent to which we should aim for distributive equality—and of what—in society as a whole. Answers to this question have substantial implications for policy, but on the other hand they are intensely controversial, and there is no sign of agreement in sight. And, most importantly, they cannot justify positive sex equalization without infringing the principle of negative equality. It is essential to recognize the two as distinct, and only the first as dealing directly with the matter of sex equality.

But the distinction seems to be easily overlooked, as can be illustrated by a controversy that pervaded left-wing politics some time ago. When modern feminism got going in the late nineteen-sixties there was a good deal of argument with other radical groups about what should be regarded as the Primary Struggle. Socialists were inclined to say that the global injustices of poverty and inequality were far more fundamental than women's problems. Justice to women, as to everyone else, would follow from the establishment of True Socialism, and there was no point in trying to get equality for women against the background of an unjust political system, because both women and men would still be unjustly treated at the end of it. Feminists, on the other hand, were inclined to argue that the oppression of women by men was the root of all other evils, and were not pleased by the implication that they should go on typing envelopes and washing the leaders' socks until the Revolution had triumphed and put everything right.

This debate provides a good illustration of the distinction being discussed here, because it overlooked the *irreducibility* of the two kinds of issue. Working to eliminate balls and chains is neither a substitute for working to change the fundamental values that underpin the rules of the race, nor a rival to it. And the same is true the other way round. It is true that removing the arbitrary disadvantage suffered by women does nothing, in itself, to change underlying social ideals; but the reverse applies as well. Changing the underlying ideals does nothing—except possibly by accident—to remove the arbitrary disadvantaging of women. Since arbitrary disadvantage is by

definition a matter of disadvantaging women *in spite of* underlying general principles, rather than because of them, there is no reason to think that a change of generalizable principles will affect the disadvantage to women. And that is not just a matter of theory: we have seen over and over again—in the French and American and Russian and Chinese revolutions, as well as in gentler kinds of change—how radical political changes can leave attitudes to women virtually unchanged, and make it essential to establish the pursuit of sex equality as a separate issue. The fact that neither kind of campaign can bring about justice in all respects on its own is not a shortcoming of either, just an inevitable consequence of their irreducibility.

And in case impartiality without equality of outcome still sounds too little as the goal of a campaign for sex equality, there is one further point to bear in mind. Feminists have very good reason to be suspicious about a principle of equality that allows for the possibility of women's remaining at a real disadvantage to men; but the same principle works the other way round. After all, if men went to so much trouble to devise special impediments for women, that rather suggests an apprehension that that without those impediments, women might get ahead.

Remember the early history of intelligence testing. Women kept doing better in the original tests, so the tests were re-worked until men did equally well: that is what the pattern recognition elements are for. That is the kind of thing that can happen if positive sex equality is adopted as an ideal. Perhaps it is just as well that it cannot be justified.

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